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TESTIMONY FOR PLAINTIFF

	DI.	CR.	REDI.	RECR.
Howard Morgan	23	30	40	
Jasper Page	41	46	54	
Peter Spooner	55	59	63	
Fred Stegman	64	67	71	
Clarence Payne	72	75	83	87

TESTIMONY FOR DEFENDANT

	DI.	CR.	REDI.	RECR.
Glen O. Smith	93	99	103	
O. W. Marsh	106	112	113	
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IN THE

United States District Court

Northern District of Ohio

Eastern Division

CAPTION

NORTHERN DISTRICT OF OHIO, }
EASTERN DIVISION, } ss:

Record of proceedings of the District Court of the United States within and for the Northern District of Ohio in the cause and matter hereinafter stated. Said action was commenced on the 20th day of September, 1944 and proceeded to final disposition on the 5th day of May, and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: The Honorable ROBERT N. WILKIN,
United States District Judge.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

vs.

THE GENERAL INDUSTRIES COMPANY.

Civil Action No. 22449

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Plaintiff,

vs.

THE GENERAL INDUSTRIES COMPANY.
Defendant.

Civil Action No. 22449

Basis of Action—Injunction

For Plaintiff:

Charles A. Reynard and *Frank R. Dittoe*, 4237 Post Office Building.

For Defendant:

Reese Dill, Union Commerce Bldg. *Glen O. Smith*, Union Commerce Bldg.

DOCKET ENTRIES

9-20-44—Complaint filed.

9-20-44—Affidavit of Charles A. Reynard filed.

9-20-44—Affidavit of Howard B. Morgan filed.

9-20-44—Summons issued. Copy of summons to the Marshal.

9-20-44—Order to Show Cause Oct. 9, 1944 at 10:00 A. M. filed and entered, Wilkin, J. Noted 9-20-44.

9-20-44—2 true copies of Order to Show Cause to the Marshal.

Docket Entries

9-26-44—Summons returned and filed. Served The General Industries Company 9-23-44. Fees $4.96.

9-26-44—Marshal's Return on true copy of Order to Show Cause filed. Served The General Industries Company 9-23-44. Fees $2.00.

10- 9-44—Hearing on Motion for Preliminary Injunction begun but not concluded; continued to October 30, 1944 at 10:00 a. m. Cleveland Time upon application of Defendant, entered, Wilkin, J. Noted 10-9-44. Notice mailed.

10-27-44—Stipulation and Order continuing hearing on Order to Show Cause until Nov. 8, 1944 at 10:00 A. M. filed, Wilkin, J. Noted 10-27-44. Notice waived.

10-27-44—Stipulation and Order granting defendant leave to move or plead on or before Nov. 3, 1944, filed, Wilkin, J. Noted 10-27-44. Notice waived.

11- 1-44—Answer filed. Served 10-30-44.

11- 6-44—Stipulation and Order that hearing on Order to Show Cause and on the merits, is continued until Dec. 18, 1944 at 9:30 a. m. E. S. T., filed and entered, Wilkin, J., Noted 11-6-44. Notice waived.

3-22-45—Trial to Court begun; granting defendant leave to file amended answer by 3-27-45; trial not concluded; adjourned to 11:00 o'clock A. M. tomorrow entered, Wilkin, J. Noted 3-22-45. Notice to counsel.

3-23-45—Trial resumed and concluded; both briefs to be filed by March 30, 1945, entered, Wilkin, J. Noted 3-23-45. Notice to counsel.

3-23-45—Plaintiff's Ex. 1 to 6 inc. filed.

3-23-45—Defendant's Ex. "A" to "N" inc. filed.

3-27-45—Amended answer filed. Mailed 3-27-45.

4-16-45—Memo. opinion of Court filed. (Finding for Deft.) Wilkin, J. Copies of memo. to counsel.

5- 5-45—Order overruling motion of plaintiff for preliminary injunction, permanent injunction denied, complaint dismissed, no costs to either party filed and entered, Wilkin, J. Noted 5-5-45. Notice waived.

5-24-45—Stipulation and Order granting Defendant leave until June 7, 1945 to lodging of Findings of Fact and Conclusions of Law, filed and entered, Wilkin, J. Noted 5-24-45. Notice waived.

6- 6-45—Stipulation and Order extending time lodging findings of fact and conclusions of law of both parties may be extended to June 14, 1945 filed, Wilkin, J. Noted 6-6-45. Notice waived.

6-14-45—Proposed Findings of Fact and Conclusions of Law of Defendant lodged. Copy served 6-14-45.

6-14-45—Proposed Findings of Fact and Conclusions of Law of Plaintiff lodged. Copy served. Copy served 6-14-45.

6-15-45—Findings of Fact and Conclusions of Law of Defendant filed, (Notices mailed) Wilkin, J.

7-10-45—Notice of Appeal filed. Copy mailed by clerk 7-10-45.

7-10-45—Designation of Contents filed.

7-10-45—Transcript of Evidence filed.

7-12-45—Stipulation of counsel waiving the necessity of filing a duplicate copy of the Transcript of Evidence filed.

COMPLAINT

(Filed September 20, 1944)

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Ohio, having its principal office, place of business and a manufacturing plant at Olive and Taylor Streets in the City of Elyria, State of Ohio within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the production, sale, and distribution of small motors and varidus plastic products.

IV.

At all times hereinafter mentioned, defendant employed and is employing approximately 1715 employees in and about its place of business in Elyria, Ohio, in the production of small motors and various plastic products and in processes or occupations necessary to such production. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from defendant's said place of business to other States.

V.

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing some of its employees in the production of goods

for interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during said period, at rates not less than one and one-half times the regular rate at which they were employed.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII.

Defendant, an employer subject to the provisions of the Act, repeatedly has violated the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since October 24, 1938, it has failed to make, keep, and preserve adequate records of some of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the total straight-time earnings for each workweek, and the total weekly overtime compensations with respect to some of its employees.

VIII.

Defendant repeatedly has violated and is violating the provisions of Section 15(a)(1) of the Act in that since

October 24, 1938, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce from its said place of business to other states, goods in the production of which some of its employees were employed in violation of Section 7 of the Act as alleged.

IX.

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff prays: (1) That a preliminary injunction be granted enjoining and restraining defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest from employing any of its employees contrary to Sections 7 and 15(a)(2) of the said Act, during the pendency of this action or until further order of the Court; (2) that a judgment be entered permanently enjoining and restraining defendant, its officers, agents, servants, employees, attorneys and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act; and (3) such other and further relief as may be necessary or appropriate.

DOUGLAS B. MAGGS,
Solicitor,

ARCHIBALD COX,
Associate Solicitor,

CHARLES A. REYNARD,
Regional Attorney,

FRANK R. DITTOE,
Attorney,

Attorneys for Plaintiff,
United States Department
of Labor.

Post Office Address:
Department of Labor,
4237 Post Office Bldg.,
Cleveland 13, Ohio,
or
Office of the Solicitor,
Department of Labor,
Washington 25, D. C.

STATE OF OHIO, }
COUNTY OF CUYAHOGA } ss:

Charles A. Reynard, being first duly sworn, deposes and says that he is Regional Attorney for the Eighth Region of the Wage and Hour Division, United States Department of Labor, and is one of the counsel for L. Metcalfe Walling, applicant; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those averments which are covered by the affidavit of Howard B. Morgan, and that as to those matters he believes them to be true.

CHARLES A. REYNARD.

Sworn to and subscribed before me this 18th day of September, 1944.

(SEAL) L. A. SCHNITZER, *Notary Public*,

My Commission Expires Sept. 27, 1946.

ORDER TO SHOW CAUSE

(Filed September 20, 1944)

Upon consideration of the complaint filed herein on the 20th day of September, 1944, duly verified by Charles A. Reynard on the 18th day of September, 1944, and the annexed affidavits of Howard B. Morgan and Charles A. Reynard, and upon application of plaintiff for a preliminary injunction, it is

ORDERED that defendant show cause, if any there be, before this Court at Room ..... in the Federal Building in the City of Cleveland, Ohio, on the 9th day of Oct., 1944, at 10 o'clock E. S. T. (..... Cleveland time) of that day or as soon thereafter as counsel can be heard why a preliminary injunction should not issue, enjoining and restraining defendant from employing any of its employees in violation of sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938.

R. N. WILKIN,
United States District Judge.

AFFIDAVIT OF HOWARD B. MORGAN

(Filed September 20, 1944)

STATE OF OHIO, }
COUNTY OF CUYAHOGA, } ss:

Howard B. Morgan being duly sworn, deposes and says that he is an inspector of the Wage and Hour Division of the United States Department of Labor; that it is a part of his official duties to undertake investigation in the States of Michigan and Ohio, of violations of the Fair Labor Standards Act of 1938, hereinafter referred to as the Act, under the direction of the Regional Director of said division. Pursuant to instructions of said Regional Director Grace G. Glascott, your deponent undertook an

investigation of the General Industries Company of Elyria, Ohio, defendant in this case, completing said investigation on or about May 18, 1944.

In the course of said investigation your deponent learned from defendant's books, records and oral conversations with defendant's agents and its employees the following:

1. That defendant is a corporation engaged in the manufacture and production of small electric motors and plastic products, 75 per cent or more of which it sells and ships in interstate commerce.

2. That during the course of his investigation your deponent learned that defendant was at that time employing and had employed for many years prior thereto one Jasper Page, one Peter Spooner and one Fred Stegman as stationary engineers or firemen; that the duties of said employees are to observe the operation of the various machines in defendant's engine room, including pumps, generators and air compressors, and to clean and oil the machinery and make or assist in the making of all repairs required by such engines and machinery; that such work is customarily performed by employees not exempt from the overtime provisions of the Fair Labor Standards Act and that these employees devote substantially all of their working time in the performance of such duties; that said employees do not have any other employees working under their direction nor do they have power to hire or fire any of defendant's employees; that said employees are employed on a salary basis and regularly and customarily work in excess of forty hours each week without being compensated for their overtime employment in accordance with the provisions of section 7 of the Act.

3. That in the course of his investigation your deponent learned that defendant was at that time, and for many years prior thereto, employing one Clarence W. Payne; that for a period of approximately five years the said Payne has been employed as assistant paymaster; that in his capacity as assistant paymaster the said Payne is in charge of setting up and operating various business machine equipment; that while he has a group of approxi-

mately seven persons working under his supervision in the operation of such machines, his supervisory duties in connection therewith does not exceed ten per cent of his hours of employment, and substantially all of the remainder of his time being devoted to the operation of the machines themselves and other work identical in nature to that performed by employees under his direction; that said Payne is employed on a monthly salary basis and regularly and customarily works in excess of forty hours per week without being compensated for his overtime hours of employment in accordance with the requirements of section 7 of the Act.

4. That at the conclusion of his inspection your deponent caused to be directed to defendant a letter dated April 22, 1944, a copy of which marked Exhibit "Morgan 1" is attached hereto and made a part hereof, advising defendant of the findings described in paragraphs 2 and 3 above, and requesting it to conform its practices with respect to the employment of these employees so as to comply with the provisions of section 7 of the Fair Labor Standards Act; that thereafter on June 30, 1944 a conference between defendant's representatives and your deponent together with other representatives of the Wage and Hour Division was held at the latters' office, at which time the matters mentioned in your deponent's letter of April 22, were fully discussed; that on July 11, 1944 deponent's immediate supervisor, Loyd J. Coder, inspector of the Wage and Hour Division, United States Department of Labor, directed a further letter to the defendant concerning the same matters and soliciting information concerning defendant's current practices with respect to the employment of the individuals mentioned in paragraphs 2 and 3 above; a copy of said letter, dated July 11, is attached hereto and made a part hereof as Exhibit "Morgan 2"; that under date of July 13, 1944, defendant's treasurer, C. F. Russert, directed a letter to your deponent's immediate supervisor, Loyd J. Coder, in reply to the latter's letter of July 11, stating in part that "therefore we cannot pay them on the basis you pro-

pose;" a copy of defendant's treasurer's letter, dated July 13, 1944, is attached hereto and made a part hereof as Exhibit "Morgan 3".

HOWARD B. MORGAN.

Sworn to and subscribed before me this 18th day of September, 1944.

(SEAL) L. A. SCHNITZER, *Notary Public,*

My Commission expires September 27th, 1946.

EXHIBIT "MORGAN 1"

4237 Post Office Building
Cleveland 13, Ohio
April 22, 1944

The General Industries Company
Olive and Taylor Streets
Elyria, Ohio

Gentlemen:

An inspection of your firm disclosed Section 7(a)(3) and Section 11(c) violations of the Fair Labor Standards Act. Section 7(a)(3) violation occurred due to the firm erroneously classifying three stationary engineers and one chief tabulating operator as exempt under Regulations Part 541 of the Act. Section 11(c) of the Act was violated due to the lack of certain personnel information.

The computations recently submitted by you covering the period of time the Section 7(a)(3) violations existed have been checked and some corrections made in accordance with the standard procedure of this Division.

A summary in duplicate of unpaid wages listing the names, addresses and amounts due the employees affected is enclosed herewith. As you pay each employee, have him affix his signature in the space above his typewritten name on both copies of the summary. A carbon copy is to be retained for your files and the original forwarded to this office within ten days from today. When payments have

been completed by you and verified by this office the case can be closed.

In regard to the future, it is requested that your plant will comply with all requirements of the Fair Labor Standards Act and while working on Government contracts to comply with the stipulations of the Walsh-Healey Act as well.

Your cooperation will be appreciated.

Very truly yours,

LUCILLE D. NEWTON,
Supervising Inspector,
By: HOWARD MORGAN,
Inspector.

Enc.

EXHIBIT "MORGAN 2"

4237 Post Office Building
Cleveland 13, Ohio
July 11, 1944

The General Industries Company
Olive and Taylor Streets
Elyria, Ohio

Gentlemen:

An inspection of your firm under the provisions of the Fair Labor Standards Act was recently completed by a representative from this office. This inspection disclosed violations of the overtime provisions (Section 7(a)(3), as well as the record-keeping provisions 11(c) of the Act.

Section 7 violations were the result of your firm's failure to pay proper overtime compensation to three stationary engineers and one office employee.

On April 22, we forwarded you a wage receipt summary form upon which was listed the names and amounts found to be due the four employees affected. In accordance with the standard policy of the Division, it was requested that you come into retroactive compliance by paying the four

employees the back wages found to be due them. You were instructed to pay the four employees and forward to this office evidence of the completed payments in the form of signed receipt forms.

If further consideration is to be given to the closing of this case on a voluntary compliance basis, it will be necessary for you to complete the payments and forward the signed receipt forms not later than July 15.

We wish to take this opportunity to advise you that employees have an independent right of action under Section 16(b) of the Act for any wages that may be legally due.

In your reply to this letter, will you please indicate whether or not the four employees herein referred to are at this time being paid in accordance with all provisions of the Act.

Very truly yours,

LUCILE D. NEWTON,
Supervising Inspector.

By: LOYD J. CODER,
Inspector.

EXHIBIT "MORGAN 3"

THE GENERAL INDUSTRIES COMPANY

Elyria, Ohio, U. S. A.
July 13, 1944

In reply refer to
C. F. Russert

Loyd J. Coder, Inspector,
U. S. Department of Labor
Wage & Hour & Public Contracts Div.,
4237 Post Office Bldg.,
Cleveland 13, Ohio

Dear Sir:

We acknowledge receipt of your letter of July 11 wherein you claim that your inspection report discloses viola-

tions of the overtime provisions (Section 7(a)(3), as well as the record-keeping provisions § 11(c) of the Act.

We wish to confirm what we have previously told you at recent meetings—that our records, and the duties performed by the employees in question, clearly show that these are exempt employees; therefore we cannot pay them on the basis you propose or pay them back pay.

Yours very truly,

THE GENERAL INDUSTRIES COMPANY,
(s) C. F. RUSSERT, *Treasurer.*

cgw/d

AFFIDAVIT OF CHARLES A. REYNARD

(Filed September 20, 1944)

STATE OF OHIO, }
COUNTY OF CUYAHOGA, } ss:

Charles A. Reynard, being duly sworn, deposes and says that he is the Regional Attorney for the Eighth Region of the United States Department of Labor; that the said Eighth Region consists of the States of Michigan and Ohio; that it is a part of his official duties to undertake to secure compliance with the provisions of the Fair Labor Standards Act through the giving of information and negotiations as well as the institution of legal proceedings; that on or about July 15, 1944, there was referred to him by Grace G. Glascott, Regional Director of the Wage and Hour Division, United States Department of Labor, the matter of securing compliance with the provisions of the Fair Labor Standards Act by The General Industries Company, defendant in this action; that your deponent thereafter assigned an investigator to make a further inspection of defendant's employment practices concerning

its employees Peter Spooner, Jasper Page, Fred Stegman and Clarence W. Payne; that said investigator's report to your deponent showed that defendant persisted in its practice of employing said employees in violation of the overtime provisions of section 7 of the Act; that thereafter under date of August 21, your deponent caused to be directed to defendant a letter calling its attention to the continuing violations and requesting that your deponent be advised if defendant intended to conform its practices with respect to these employees so as to comply with the overtime provisions of the Act, and suggesting a conference if defendant's representatives wished to confer further in the matter; a copy of said letter dated August 21, 1944, is attached hereto and made a part hereof as Exhibit "Reynard 1"; that to the date hereof your deponent has received no reply to his letter of August 21, or any other communication from the defendant.

CHARLES A. REYNARD.

Sworn to and subscribed before me this 18th day of September, 1944.

(SEAL) L. A. SCHNITZER, *Notary Public.*

My Commission expires September 27, 1946.

EXHIBIT "REYNARD 1"

4237 Post Office Building
Cleveland 13, Ohio
August 21, 1944

General Industries Company
Elyria, Ohio

Attention of C. F. Russert, Treasurer

Gentlemen:

The case file containing the findings of the inspector made in the course of an investigation recently concluded at your plant to determine the extent of your compliance

with the Fair Labor Standards Act, has been referred to me for review and recommendation.

The violations, as you have been previously advised, affected four employees, three of whom are stationary engineers and the fourth, a chief tabulating operator, all of whom have heretofore been considered to be exempt from the overtime provisions of the Act by virtue of section 13(a)(1) and the regulations issued pursuant thereto. The file discloses that these matters have been discussed at length between department and company representatives, and in your letter to Mr. Coder, of this office, dated July 13, you advise that

> We wish to confirm what we have previously told you at recent meetings—that our records, and the duties performed by the employees in question, clearly show that these are exempt employees; therefore we cannot pay them on the basis you propose or pay them back pay.

I note also in my review of the file that under date of June 22, 1943, I wrote a letter to your company in reply to your inquiry of June 19, advising that an "assistant paymaster" referred to in your letter, might properly be regarded as being employed in an exempt capacity on the basis of the facts set forth in your letter of June 19, 1943. In the event that the "assistant paymaster" referred to in your letter of June 19, is the same as the chief tabulating operator included in the inspector's findings, my letter of June 22, 1943 should be modified in the light of the additional facts discovered in the course of the investigation. It appears that the individual involved devotes a very substantial part of his time to manual work incident to the operation of tabulating machines, this work being of the same nature as that performed by other employees in the department. He does, of course, have some additional duties of setting up the machines for other employees, but these duties as well as the amount of time devoted to them are not sufficient to warrant his exemption within the language of the Act or regulations.

The three stationary engineers are clearly non-exempt

and should be compensated in accordance with the provisions of the Act.

Before proceeding further in the matter of framing my recommendation I would appreciate hearing from you in view of the matters discussed in this letter and in the event you wish to discuss the problems in person I should be glad to arrange a conference for that purpose. May I hear from you not later than Friday, August 25.

Very truly yours,

CHARLES A. REYNARD,
Regional Attorney.

ANSWER

(Filed November 1, 1944)

Defendant answers the Complaint herein as follows:

FIRST DEFENSE

The Complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The plaintiff is not entitled to the relief sought because the defendant, in the employment of its employees, the maintenance of its records, and the operations of its business, has at all times complied with the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 29 U.S.C.A. 201, et seq.).

THIRD DEFENSE

Defendant admits the allegations contained in paragraphs II, III and VI of the Complaint.

Defendant admits the allegations contained in paragraph IV of the Complaint, except it denies that at all times mentioned in the Complaint it employed approximately

1715 employees in and about its place of business in Elyria, Ohio.

FOURTH DEFENSE

Defendant denies the allegations contained in paragraphs V, VII, VIII and IX of the Complaint.

Except as hereinabove admitted or qualified, defendant denies each and every allegation in the Complaint.

WHEREFORE, defendant prays for judgment dismissing the Complaint, with costs and disbursements, and for such other and further relief as the Court may deem just and proper.

GLEN O. SMITH,
M. REESE DILL,
950 Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorneys for Defendant.

STATE OF OHIO, }
CUYAHOGA COUNTY, } ss:

GLEN O. SMITH, being first duly sworn, deposes and says that he is one of the attorneys for The General Industries Company, defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

GLEN O. SMITH.

Sworn to before me and subscribed in my presence this 28th day of October, 1944.

(SEAL) ELVI KAHKONEN, *Notary Public.*

SERVICE

A copy of the foregoing answer has been mailed to Mr. Charles A. Reynard, Attorney for Plaintiff, at 4237 Post Office Building, Cleveland 13, Ohio, this 30th day of October, 1944.

GLEN O. SMITH,
Attorney for Defendant.

AMENDED ANSWER

(Filed March 27, 1945)

Leave of Court first being obtained, defendant files this Amended Answer and answers the Complaint herein as follows:

First Defense

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The plaintiff is not entitled to the relief sought because the defendant, in the employment of its employees, the maintenance of its records, and the operations of its business, has at all times complied with the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 29 U.S.C.A. 201, et seq.)

Third Defense

Defendant admits the allegations contained in paragraphs II, III and VI of the Complaint.

Defendant admits the allegations contained in paragraph IV of the Complaint, except that it denies that at all times mentioned in the Complaint it employed approximately 1715 employees in and about its place of business in Elyria, Ohio.

Fourth Defense

Defendant denies the allegations contained in paragraphs V, VII, VIII and IX of the Complaint.

Except as hereinabove admitted or qualified, defendant denies each and every allegation in the Complaint.

Fifth Defense

Defendant says that its employees, who are employed by the defendant in the production of goods for interstate commerce and who are not receiving compensation for employment in excess of forty (40) hours at rates not less than one and one-half times the regular rate at which they are employed, are exempt from the provisions of the Fair Labor Standards Act of 1938 by virtue of Section 13(a)(1) of the said Act, and the Administrative Regu-

lations of the Administrator of the Wage and Hour Division of the United States Department of Labor.

WHEREFORE, defendant prays for judgment dismissing the Complaint, with costs and disbursements, and for such other and further relief as the Court may deem just and proper.

GLEN O. SMITH,
M. REESE DILL,
950 Union Commerce Bldg.,
Cleveland 14, Ohio—MAin 0313,
Attorneys for Defendant.

STATE OF OHIO, }
CUYAHOGA COUNTY, } ss:

GLEN O. SMITH, being first duly sworn, deposes and says that he is one of the attorneys for The General Industries Company, defendant herein; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

GLEN O. SMITH.

Sworn to before me and subscribed in my presence this 27th day of March, 1945.

(SEAL) ELVI KAHKONEN, *Notary Public.*

SERVICE

A copy of the foregoing amended answer has been mailed to Mr. Charles A. Reynard, Attorney for Plaintiff, at 4237 Post Office Building, Cleveland 13, Ohio, this 27th day of March, 1945.

GLEN O. SMITH,
Attorney for Defendant.

TRANSCRIPT OF EVIDENCE

(Filed July 10, 1945)

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Plaintiff,

vs.

THE GENERAL INDUSTRIES COMPANY.
Defendant.

Civil Action No. 22449

WILKIN, J. Trial had March 22-23, 1945

APPEARANCES:

For the Plaintiff:
Charles A. Reynard, Esq., and *Frank R. Dittoe, Esq.*

For the Defendant:
Glen O. Smith, Esq., and *Melville Reese Dill, Esq.*

Mr. Smith: If your Honor please, may we at this time have a stipulation that should it become pertinent, the defendant has leave to file an amended answer?

The Court: Yes, you may amend if you wish to set up that claim or special defense.

Mr. Reynard: I wonder if we could have the record show just what the defense is; that is, which of the several possible exemptions defendant wishes to rely upon; whether executive, administrative, or professional employment exemption.

Mr. Smith: If your Honor please, I don't think that

becomes pertinent. I think we should have available to us any or all of the exemptions whichever the facts are we are entitled to. Clearly we have two different classifications before us in this particular matter and they are not analogous. It is true these men have some qualifications that might put them in the administrative and there are others that might contend they are in the executive, but I think the facts, as the evidence will show, should be available to the defense for either or both.

The Court: Well, the court will grant you leave to file an amended answer. I think it ought to be filed by tomorrow. You can set up whatever the facts are, whatever you wish to set up, showing the special circumstances for the employment of each employee or each group.

Mr. Reynard: Very well. I wonder if we can include, if necessary, with the original stipulation, that the work of all four of the employees is necessary for the production of goods for interstate commerce.

Mr. Smith: Yes, that is admitted in the answer.

Thereupon the plaintiff called as a witness

HOWARD MORGAN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Reynard:

Q. Will you please state your name?

A. Howard Morgan.

Q. What is your occupation?

A. Inspector for the Wage and Hours and Public Contracts Division, U. S. Department of Labor.

Q. How long have you been so employed?

A. Approximately two and a half years.

Q. And who is your supervisor in that capacity at the present time?

A. Russell Kingston.

Q. How long has he been your supervisor?

A. For approximately three or four weeks.

Q. And who was your supervisor prior to that time?

A. Grace G. Glascott.

Q. Have you ever in the course of your duties as an inspector for the Wage and Hour and Public Contracts Division of the Department of Labor been assigned to make an inspection of the General Industries Plant at Elyria, Ohio?

A. Yes, I have.

Q. What was the purpose or nature of that investigation?

A. To obtain compliance with the Wage, Hour and Public Contracts regulation.

Q. Were your findings or your report of that investigation reduced to writing?

A. Yes, sir.

Q. I hand you case file to refresh your recollection in connection with several questions I will ask you. When did you first begin the investigation of the General Industries Company?

A. February 21, 1944.

Q. And when was that investigation completed?

A. May 18, 1944 and of course I worked intermittently during that period on the case.

Q. That is, were you working with other cases at the same time?

A. Yes, sir.

Q. With whom did you have discussions at the company in the course of making your investigation?

A. Mr. Russert and his assistant.

Q. Do you know Mr. Russert's title?

A. He is Treasurer.

Q. Did you at any time in the course of your investigation and in the course of your discussions with Mr. Russert have occasion to consider four of the defendant's employees, that is, Mr. Payne, Mr. Page, Mr. Stegman, or Mr. Spooner?

A. Yes, sir.

Q. And how did you happen to discuss these four employees?

A. I of course when I first started the inspection, I asked for a list of the exempt employees who did not

get overtime compensation, and I was given a list and it included the four men mentioned.

Q. Is this list, marked for identification Plaintiff's Exhibit 1, the list that Mr. Russert furnished you at your request?

A. Yes, sir.

Q. And are the four individuals to whom I have referred listed on that exhibit?

A. Yes, sir.

Q. And under what classifications or under what legends do their names appear, or how are they classified?

A. One is under "40 to 48 hours".

Q. Who is that one?

A. That is C. W. Payne, and one is Fred Stegman, under "No overtime", and Peter Spooner, and Jasper Page, under "46 to 53 hours".

Q. Now, did you later discuss exempt status or claimed exempt status of these individuals with Mr. Russert or other officials of the company?

A. Yes, sir.

Q. And what was the nature of the discussion?

A. Well, of course, I drew their attention to the fact that I classed these men as non-exempt employees.

Q. On what basis?

A. On the basis of their duties performed.

Q. And on what authority did you claim that they weren't entitled to the exemption that had been claimed for them?

A. The basis that they didn't qualify for any of the exempt employees classifications.

Q. And where are those exemptions set up, or by what authority are they prescribed?

A. Under the Act itself.

Q. Do the definitions of the terms of the various classifications appear in the Act itself?

A. In the regulations.

Q. I will hand you a document marked for identification Plaintiff's Exhibit 2. On what basis did the company assert these employees were entitled to exemptions,—were

they claimed to be executives, administrators, professional employees, or outside salesmen, or which specific exemption did they claim?

A. Well, they didn't necessarily say any particular exemption, whether, executive, administrative, or professional, but they said they might qualify for one of them.

Q. Take in the case of the engineers, Messrs. Page, Stegman, and Spooner, for what reason did you claim they were not entitled to the executive exemption, if you did?

A. That the type of work they did was manual in nature, and of course they didn't supervise employees.

Q. For what reason did you disallow or claim the administrative exemption was inapplicable?

A. Well, of course, on the basis that their work was manual in nature primarily.

Q. Turning to Mr. Payne, what claim did the company make for asserting an exemption for him, if you remember?

A. The executive exemption is all.

Q. For what reasons did you oppose that claim?

A. That he spent a large part of his time on work of a non-exempt nature and spent very little time in supervision.

Q. Now, what followed your conversations with Mr. Russert about these claimed exemptions which you thought were improperly taken?

A. Well, of course, he didn't agree with me on them, and on the basis that the work that they did was of an exempt nature and that they did qualify for the exemptions.

Q. Did you ask him to make any changes in their status?

A. Yes, I did.

Q. And did you ask him to make any adjustments or restitutions for claims of past violation?

A. Yes, I did.

Q. And what arrangements did you make for that type of disposition of the case?

A. I asked him to make computation covering any back wages that might be due.

Q. And was that done?

A. Yes, sir.

Q. When were the computations given to you?

A. Received April 1, 1944.

Q. Were they handed to you personally or mailed in by letter?

A. These were mailed in.

Q. What action did you take after the receipt of that letter or those computations?

A. Well, I started having the computations checked by our pay roll department.

Q. After they were checked what did you do?

A. And started preparing a summary of the amount due.

Q. Was that summary given to the company?

A. Yes.

Q. How?

A. I handed it to them personally.

Q. Did you give them any instructions, either oral or written, about what they were to do with the summary?

A. Yes, sir, I give them written instructions.

Q. Was that in the form of a letter?

A. Yes, sir.

Q. What is the date of the letter, if you know?

A. April 22, 1944.

Q. That is the same letter, is it not, that is part of your affidavit attached to the complaint in this case, identified as Exhibit "Morgan 1"?

A. Yes, sir.

Q. What happened after that summary had been presented to the company in the manner you have stated?

A. At that time I was told that the company would like to delay any payment until the presentation of an Army and Navy E award had been given the firm, and I agreed that that would be satisfactory.

Q. What happened after that?

A. After that I stopped in at the company and I was told that the firm would have their attorney handle this case.

Q. Do you know their attorney's name?

A. Yes.

Q. Who is he?

A. Mr. Smith.

Q. Did you afterwards discuss the case with Mr. Smith?

A. Yes, sir.

Q. And what was the occasion of those discussions and where were they held?

A. They were held in the Division's office.

Q. What followed as a result of those discussions?

A. Mr. Smith contended that as far as complying with our request, it would not be granted.

Q. Which request?

A. For compliance, immediate compliance, and any restitution.

Q. Was any claim made by Mr. Smith that these employees had been properly paid?

A. No, sir.

Q. Had any other company representative made any claim they were properly paid?

A. No.

Q. What was the reason they refused to make any further payment to the employees, or what was the reason given by Mr. Smith or the other representatives?

A. That they were exempt from the provisions of the law.

Q. Exempt for what reason?

A. Of their duties they performed.

Q. Was that the only reason urged by the company?

A. Yes.

Q. Following your conferences with Mr. Smith, what further did you do with the file in the attempt to effect a disposition?

A. Well, I contacted Mr. Smith on the 'phone.

Q. When was that, do you know?

A. That was on July 7, 1944.

Q. Have you a memorandum in your file to that effect?

A. Yes, sir.

Q. That is the only reason you know it was July 7, is it?

A. Yes, sir.

Q. What was done after that telephone to effect or try to effect the settlement of the case?

A. A letter was written to the firm by my immediate supervisor, Mr. Coder.

Q. Did you assist him in the preparation of that letter?

A. Yes, sir.

Q. What date does that letter have?

A. July 11, 1944.

Q. Is that the same letter that is attached to your affidavit known as Exhibit "Morgan 2" attached to the complaint in this case?

A. Yes, sir.

Q. What did you then do? Was there a reply received to that letter?

A. Yes, there was a reply received from the company.

Q. Under what date?

A. Dated July 13, 1944.

Q. And is that the letter that is attached to your affidavit marked "Morgan 3", as part of the file in the case?

A. Yes, sir.

Q. What was done after the receipt of that letter?

A. The case was submitted to the regional Director.

Q. Does the file show what if any action was taken after that in an effort to effect compliance?

A. Nothing further.

Q. Anything further addressed to the company or any further contacts with the company made?

A. There was a letter dated August 21, 1944.

Q. To whom is it addressed?

A. To Mr. C. F. Russert.

Q. And who sent that letter?

A. Charles Reynard.

Q. Is that the same letter that is made part of my affidavit in this file marked Exhibit "Reynard 1"?

A. Yes, sir.

Q. Does the file show whether any reply was received to that letter of August 21?

A. There was no reply to it.

Mr. Reynard: I would like to offer in evidence Exhibits

identified as Plaintiff's Exhibits 1 and 2, your Honor. That is all.

Mr. Smith: No objection.

The Court: They will be received.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Morgan, you say you conducted this investigation between February 21, 1944 and May 14, 1944?

A. Yes, sir.

Q. Now, how many trips did you make to the plant?

A. Well, I couldn't say for sure how many. I worked on the case intermittently.

Q. How many times did you appear in the power house?

A. In the power house?

Q. Yes, of the company?

A. I didn't go in the power house.

Q. Did you go in there and supervise the engineers and their work?

A. Supervise?

The Court: He said he didn't go in.

The Witness: I said I didn't go in the power house.

Q. You made your findings based upon the work of the firemen or the engineers that you talked to?

A. Yes, that and the records of the company.

Q. Now, just stopping there for a moment, you have referred to some talks that you had with me; is that correct?

A. Yes, sir.

Q. Now, before you talked with me about this matter did you know or ever been told anything about the Union angle in this particular picture?

Mr. Reynard: I object to that. It is entirely immaterial what the Union picture may have been.

Mr. Smith: No; it goes to this affidavit. He says in his affidavit there was no allowance made for overtime and no payment made for overtime. Now, that is not an accurate statement.

The Court: You may ask him.

Q. Before you talked with me down at your office, did you know anything at all about the Union picture in this company?

A. I had been told about that, yes.

Q. Isn't it true that I was the first one to tell you and the other men down in your office about the problems that we had in connection with these engineers and the Union?

A. That you were the first one?

Q. Yes.

A. No, sir.

Q. Do you remember my telling you distinctly when these engineers were put on a salary that overtime was figured into the base salary?

A. No, sir.

Q. You mean I didn't tell you that then?

A. No, sir.

Q. Do you remember my telling you that up until February 1, 1941 these engineers were on an hourly rate of pay?

A. Yes, sir.

Q. I did tell you that?

A. Yes, sir.

Q. And did I tell you that the engineers on February 1, 1941 were put on a salary?

A. I believe so.

Q. Did I tell you why?

A. I don't believe so, no, sir.

Q. Didn't I tell you about the contract with the Union, the new contract which was entered into at that time?

A. As far as the Union itself, yes, but there was no mention about any overtime pay at that time.

Q. Nothing was said to you, you are testifying now, I didn't tell you that the salary of these engineers was paid was negotiated with the Union?

A. When you say "negotiated" what do you mean? I mean do you mean that the Union stipulated that that included overtime?

Q. Certainly.

A. You didn't say.

Q. If it is negotiated it means we negotiated a monthly salary these men would get for doing a month's work, which would include overtime?

A. No, sir.

Q. You didn't get that from my trip down there?

A. No, sir.

Q. You do remember that I talked considerably about the Union and the problem we had?

A. Yes, sir, I do.

Q. You remember we did execute a contract for one year dated September, 1940; do you remember that? That was the first contract, the contract for a year, and that five or six months later we had to negotiate another contract for the same employees; that was pointed out to you?

A. Yes, sir.

Q. It was pointed out to you that substantially the only difference in the two contracts was in the first contract the engineers were on an hourly rate of pay and in the second contract they are on a monthly salary?

A. Yes, sir.

Q. We did tell you at that time that we had a very difficult problem with the union or controversy with them as to whether or not these engineers were supervisors or not? Did I not tell you that?

A. Yes, sir.

Q. And did I tell you how we had resolved that difference with the Union?

A. I am trying to remember what it was. You mentioned something about that.

Q. To refresh your recollection do you recall that I told you that in this particular contract to resolve the controversy that the National Labor Relations Board would be the sole judge as to the status of these particular engineers whether they were supervisors or not?

Mr. Reynard: I object to this line of questioning. The witness has already testified that he doesn't recall Mr. Smith having told him or mentioned to him anything that would indicate that this Union contract included overtime.

I don't believe further questioning about the terms of the contract has any material bearing on this case.

The Court: I think probably ultimately you will be right. I don't yet see the pertinency of this, but Mr. Smith has the right to cross examine this witness about the exhibits offered. You may proceed.

Mr. Smith: I want to be frank. The only purpose I have,—I am disappointed when I hear the witness say the question of overtime wasn't discussed and taken into consideration with the Union. It certainly was.

The Court: He is testifying of course as to a conversation that he had with you. That is, you claim it was. You will have to show that.

Mr. Smith: Of course we contend it is pertinent on the Buelow case, because what we did the contracts themselves will speak for. This thing was done by a negotiation with the Union.

The Court: Well, the court rules you have the right to refresh your witness' memory as to the conversation that occurred.

Q. Just one more question along that line: you do recall that in these talks that I had at your office we discussed at great length the problems that the company had with this particular Union on the question as to whether or not these engineers were supervisors?

A. Yes, sir.

Q. We did discuss that at great length, and the talks that we had down there, there were two or three of them, they lasted at least two or three hours each time; that is correct, is it not?

A. Yes.

Q. And it is also true that when we got through in your office that last time I was down there you took us over to General Counsel for the Division and we again went over it there with General Counsel?

A. Yes.

Q. Now you say that you had made your findings that these men are non-exempt, the engineers I am talking about first, because you found their work was manual and not supervisory; is that correct?

A. Yes.

Q. Did you find from the records of all your investigation that there was any other supervision in the power house except these engineers, one on each shift?

A. There was a chief engineer.

Q. But the chief engineer took one shift, did he not, the first shift?

A. Yes, sir. He was there with another man.

Q. But the engineers are the only supervision that the company has in the power house; is that correct?

A. When you talk of supervision you speak of supervision of employees or supervision of machinery?

Q. Machinery or employees, I don't care which it is.

A. Supervision of equipment, then I would say yes.

Q. Well, if the engineers are not supervisors, put it in the reverse, if the engineers are not supervisors, we have no supervision in the power house of either machinery or personnel?

A. Will you state your question again, please?

Q. I say, if the engineers are not supervisors then this company has no supervisors in the power house either over personnel or equipment?

A. Well, of course my contention is that they are not supervisors.

Q. My point is that if they are not, then they have no supervisors?

Mr. Reynard: I think the question is argumentative and asking for an opinion; among other things he is assuming such a situation exists.

The Court: Your question contains the word "supervisors". It seems to the other side you are arguing. That is the real point of the contention.

Mr. Smith: I will reframe the question.

Q. From your inspection out there are there any supervisors in the power house?

A. The chief engineer, one man who is on during the day.

Q. Who is chargeable with the care and operation of the power house?

A. One man who is on during the day, and he is the chief engineer.

Q. Who would there be in charge the other two shifts of the day?

A. Well, there wouldn't be any one there other than the men in question.

Q. Of course you realize and recognize that this power plant on account of the nature of the business, must be operated 24 hours a day, seven days a week; you know that, do you not?

A. Yes, sir.

Q. So that if we only have supervision on one shift, as you indicate, then we have the inference or conclusion that there is no supervision on the other two shifts?

The Court: He has answered that the men in question are in charge of the power house equipment on the other shifts.

Q. Oh, you have said that?

A. Yes.

Q. Is it true that in the talks that you had with me, particularly the first talk, that I was not familiar with and did not discuss with you or your department the question of Mr. Payne, the assistant paymaster?

A. Yes, sir.

Q. That I told you that I was only coming down there to discuss with you the question of the three engineers, for whom and with whom I had been negotiating over a period of five or six years?

A. Yes, sir.

Q. And that as a result of that I would find out what the facts were in connection with Mr. Payne and we would have another meeting?

A. Yes, sir.

Q. Mr. Morgan, do I understand that you or your department bases its conclusions in this matter on the fact that this company failed or did not answer your second letter?

A. Will you state that question again?

Q. Well, you brought out in your direct testimony here

that you wrote, along with your chief, a letter to the company making known your findings and your recommendations and that the company answered that letter and that subsequently you wrote a second letter to which the company did not make a reply? Now, I am asking you this question: the fact that the company didn't answer that second letter, are you basing your findings here or your actions on the failure of the company to answer that letter?

Mr. Reynard: I object. This witness isn't counsel in the case and he is not the one who brought the action and he is without the means of knowing why the action is brought.

(Further argument. Question allowed.)

A. Well, I would not be permitted to make a decision in regard to deciding whether that would be the reason.

The Court: Was your report based upon the failure of the company to reply in any way?

The Witness: No, sir.

Q. Now, one more question: in your affidavit attached to the petition here you have made the statement that these engineers were not compensated for overtime.

Mr. Dittoe: If I may make a correction, the witness in his affidavit says, and I believe that is what he testified to, they weren't compensated for their overtime in accordance with the provisions of Section 7.

Mr. Smith: I was just going to read the exact language: "That said employees or employee are on salary basis and regularly and customarily work in excess of forty hours each week without being compensated for their overtime employment in accordance with the provisions of Section 7 of the Act."

Q. Now, you have stated in our talk I didn't tell you overtime was included in the base salary and the employees were paid a salary. Now, if you had known that overtime was included in the base salary at the time the employees were taken from the hourly rate and put on a

salary rate, would your findings have been different in reference to the engineers?

Mr. Reynard: I object. That is purely conjectural, what he would have found if he had known certain things.

The Court: He may answer if he has any answer.

A. Very hard for me to answer a question like that because there would be so many things that would enter into it. I hardly know how to answer it.

The Court: Well, does that set of facts form any part of your report of basis of your report?

The Witness: There was no question of inclusion of overtime mentioned, your Honor. I cannot really say, because the only question that was brought out was the exemption, was the type of work the men performed, the duties.

Q. Well, if that is the case, let me try to refresh your recollection. You mean that I came down there and talked to you and spent all of the hours about the negotiations with the Union in connection with these three employees, the engineers, and I didn't tell you that their overtime was included in their base salary?

A. No, you didn't.

Q. All right, so you thought I didn't. But if I had told you and it were a fact that the overtime was included in the base salary, would your recommendation or finding be different in reference to the engineers?

A. That would have to be determined by my superiors. I would have to submit that sort of report. I couldn't decide on it. I don't have the authority.

Q. But you do say that that would have been an element that might have caused your superiors then to make a different finding?

A. I didn't say that.

Q. I say it might have.

A. I wouldn't say that either.

Q. In other words, you don't want to say anything about that?

A. I don't know.

Q. In other words, you do not know from your own observations what these engineers do or do not do in connection with work?

A. You mean did I observe them in the power house?

Q. Yes. Or did you see them any place or find out anything except what the men told you?

A. I already said I didn't see them at their work in the power house.

Q. You say these employees do not have the right to hire or fire. From whom did you get that information?

A. The men themselves.

Q. Did they tell you whether or not they had a right to make a recommendation?

A. I asked them.

Q. Did they they did not have the right to make a recommendation?

A. There is no one for them to hire and fire.

Q. There are firemen in there; there are employees in the power house except the engineers, aren't there?

A. Not under their supervision.

Q. Under whose supervision would they be if there are other employees in the power house?

A. They aren't under the engineers from their statement.

Q. Didn't you feel impelled when you were making an investigation such as this, to find out who it is who has the supervision of firemen in the most important part of the plant, who does supervise the firemen and coal passers?

A. Well, the firemen, I understand, don't need very much supervision.

Q. Or coal passers?

A. Well, I imagine they come directly under the firemen.

Q. They come directly under the firemen?

A. As far as supervision.

Q. Well, do I understand you now the fireman has the supervision in the power plant?

A. Well, so far as coal passers and so forth are con-

cerned. They don't come under the engineers. In talking to the men, all the men agreed on that.

Q. Under whom do they come, that is what I want to know? How do you base that? I mean when you were making the investigation?

A. I don't remember.

Mr. Smith: I object to the testimony of the witness, because he says he didn't go into the power plant and doesn't have the means of knowing what men are supervised.

The Court: Yes; he has made his report on the statement of the men.

Mr. Smith: That is the point I want to make. The man makes a recommendation in the affidavit upon which this action is based, and didn't even go in the power plant and doesn't know who is the supervisor of the employees there.

The Court: That is argument that may be later made.

Q. Now, coming to Mr. Payne, as I understand your testimony you said you made your finding that Mr. Payne was a non-exempt employee because of his work being manual and non-supervisory; is that correct?

A. Yes.

Q. Did you go up and observe his work in his department?

A. Yes, sir.

Q. How often did you do that?

A. Well, I would say one day I spent probably a half a day there in and out of the department, because I spent a great deal of time in that particular department in the work.

Q. You are basing your findings upon that half day observation plus what Mr. Payne himself has told you?

A. And other days I was there, too, but the one day I spent a great deal of time.

Q. And you say now he is not a supervisor because he doesn't spend much of his time supervising?

A. That is right.

Q. Did you know and do you know that he has eight or

nine employees directly under him working under his supervision?

A. They might come under him directly, but he doesn't direct their work because there is a paymaster that has charge of all those employees, and the only time Mr. Payne really supervises them is when the paymaster isn't there, and I observed Mr. Payne working right along with two or three men on his particular type of work, doing the same kind of work they were.

Q. That is true on occasion, but is that a regular and routine procedure for Mr. Payne?

A. Yes, sir.

Q. Do you know that he has under the present set-up two assistants who do practically all of that work which Mr. Payne was doing until he could get these people trained, or are you speaking of the present time?

A. When I was there.

Q. You haven't been out there recently?

A. That is right, I haven't.

Mr. Smith: That is all.

RE-DIRECT EXAMINATION

By Mr. Reynard:

Q. Mr. Morgan, Mr. Smith referred to one of the conferences he held at the Department's office at which time he and you were in and talked to what he described as General Counsel. Do you remember who that individual was?

A. Mr. Duemler.

Q. Of the legal staff?

A. Yes, sir.

Q. Coming back to this question Mr. Smith dwelt upon at considerable length about the salary including overtime: referring to Plaintiff's Exhibit 1, will you tell me how the company explained that list to you at the time he gave it to you, what it was supposed to set forth?

A. Well, the first classification is listed at "44 to 53 hours", and the men in that particular category receive straight time compensation from 44 to 53 hours of work.

Then the next classification is "40 to 48 hours", and the men working 40 to 48 hours receive straight time compensation.

Q. Did the company's representatives claim or represent to you that any one on that list was getting overtime at time and a half or all hours over 40 per week?

A. No, sir.

Mr. Reynard: That is all. Thank you.

Thereupon the plaintiff called as a witness

JASPER PAGE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Reynard:

Q. Will you state your full name?

A. Jasper Page.

Q. Where do you live?

A. Elyria.

Q. By whom are you employed?

A. By the General Industries Corporation.

Q. And in what capacity?

A. Well, I am employed in the engine room.

Q. Do you have a title or does your job have a name?

A. Well, it is called the power plant.

Q. Do you individually have a title? What is your job classification?

A. I have a license, if that is what you mean.

Q. License to do what?

A. Engineer's license.

Q. What are your hours of work: when do you go to work?

A. Well, I go at 2:00 o'clock and work until 10:30; that is, six nights a week at the present time.

Q. How long have you been employed at the General Industries Company?

A. Since 1933, a little over eleven years.

Q. Are you the only engineer on duty at the time of your particular shift?

A. Well, on my particular shift, yes.

Q. Can you describe for us briefly the nature of the room in which you work?

A. Well, I don't get just what you mean by that.

Q. Well, what is in the power house?

A. In the power house where I work there is just engines in there and compressors, and well, that is about all that is in there, engines and compressors.

Q. How many engines?

A. Well, we have three generators in there and two compressors and one small D.C.-A.C. motor that runs the D.C. motor. That is all we have in the engine room.

Q. Who else works in that room with you?

A. Nobody works in there.

Q. Nobody in there at all?

A. No.

Q. What is the source of the steam or power that runs the engines in your room; where does that come from?

A. It comes from the boiler room.

Q. Where is the boiler room located?

A. The boiler room is in connection with the same building, only a partition between there.

Q. Who works over there?

A. On my shift?

Q. Yes, on your shift?

A. There is a fireman there and coal passer on my shift. There is a fireman and helper, really.

Q. To whom are you responsible; that is, who is your immediate boss?

A. Why, Lawrence Lafteman.

Q. What is his title?

A. That is pretty hard to explain, but he is over the whole power plant. He is the boss over the whole power plant, the way I understand it.

Q. That is over both the engine room and boiler room?

A. Yes, sir.

Q. And is he ever around there during your shift?

A. Well, we can call him out at any time in the 24 hours; it doesn't make any difference; he is subject to call at any time.

Q. For what reasons would you call him?

A. For the reason that anything goes wrong or any dispute among the fellows out there, we call him out there.

Q. You mentioned disputes. What kind of disputes?

A. Well, some times them fellows out there get in a little dispute over fires or something like that.

Q. What fellows?

A. The firemen.

Q. That is, as between themselves, or between them and you?

A. Between themselves; not with me. I don't get in no trouble with them.

Q. Why don't you settle their disputes?

A. I don't have any right to settle any. The fireman's license tells him he is in charge of the boilers,—the helper works under him; so I have no right to say anything at all.

Q. Don't you ever tell them what do do?

A. No, sir.

Q. Did you ever try?

A. I wouldn't want to try because it is out of my place to go and tell a fireman how to fire the boiler or anything like that, is beyond me.

Q. Aside from disputes between the firemen and coal passers, for what other reason would you call Mr. Latteman?

A. Well, anything that may go wrong or anything that may happen.

Q. Tell us what might happen?

A. There is a lot of things would happen. Of course we couldn't tell.

Q. Tell us what would happen?

A. Things like a pump break down or something happens in the boiler room, like that; you know, we would call him out quite a number of times for different things like that.

Q. How often do you call him?

A. Not so often. Those things don't happen so often, you know.

Q. Coming down to the job, what specifically did you do as an engineer?

A. Well, I do everything an engineer is supposed to do, an engineer's job. If anything needs packing, the glands need tightening up, anything like that, we do it, and naturally oiling and wiping and mopping.

Q. What kind of mopping?

A. Well, we mop the floor, keep the grease up.

Q. What is the packing operation?

A. Packing water pumps and steam valves, steam rods, and things of that kind.

Q. Do you always call Mr. Latteman when a pump breaks down?

A. Not if it is something we can fix; we fix it.

Q. How frequently would you fix a pump?

A. Sometimes pretty frequent. Then again, it goes a long time before we bother; after they have been repaired, new stuff put in it is quite a while before we have any trouble.

Q. What kind of tools do you use in a repairing operation?

A. We have to have tools; we can't do without tools, like pipe wrenches, end wrenches, and such stuff as that.

Q. What kind of clothing do you wear?

A. I generally have my work clothes. I put them on there. I never wear overalls because I never did wear overalls. I wear pants and belt and shirt.

Q. And why don't you wear street clothes in the engine room?

A. My car wouldn't look very good when I got home.

Q. Why not?

A. Why, the grease; you can't work around pumps and engines without getting greased up. If anybody can I would like to see them. I never saw them yet that could work around that stuff without getting greased up.

Q. What other things do you do in the course of your work?

A. We have water pumps to take care of.

Q. What do you have to do with them?

A. Those ones we have got to oil up, those are the

ones we have to be particular with, and about the packing and glands, and to oil them, and such like that.

Q. Is that a regular operation you have to do every day?

A. That is every night.

Q. What other operations do you have every night? You speak of some of these things just happening every once in a while.

A. You have to oil every night, and take care of them, and look at them. You can't let them stand there without looking at them, and keeping tabs on them. You can't let the engines and pumps run; you have to watch them and keep after that. Some of these pumps are not connected with the boiler house; they are in a separate room and we have to run out and in a lot, a considerable number of times.

Q. Do you carry your own lunch?

A. Yes.

Q. Do you have the opportunity to go out and eat your lunch?

A. Being alone, I couldn't leave the engine room and go out and do that.

Q. Does any one help you in your work you have been describing?

A. No, sir.

Q. Coming back to the firemen and coal passers, did you ever hire or fire a coal passer or fireman?

A. No, sir.

Q. Who does the hiring and firing?

A. Lawrence does that. He takes care of that.

Q. Mr. Latteman?

A. Yes, sir, Mr. Latteman.

Q. Do you ever recommend that he hire or fire someone?

A. No, that is not any of my business. I ain't got no right to stick in; that is his business.

Q. On what basis are you paid, Mr. Page?

A. Well, I am paid on a salary basis by the month.

Q. How long do you work each week on an average?

A. Well, 51 hours.

Q. Do you get any overtime for those hours over 40 a week?

A. Not over 40, no.

Q. On what basis do you get any overtime?

A. If I can figure right, I don't know, around 46 hours.

Q. You get overtime after 46 hours?

A. We have been getting that.

Q. At what rate?

A. I don't know.

Q. Straight time or double time?

A. It is just straight time. I don't know. In fact I have never been told. They never said anything to me about it. They put me on salary and they said, "Your pay is so much a month". That is all I know.

Q. Did any one ever tell you your salary was made up of an hourly rate?

A. No, sir.

Mr. Reynard: That is all.

CROSS EXAMINATION

By Mr. Smith:

Q. You say you have been working out there for about thirteen years?

A. A little over eleven years.

Q. During all that time you have considered yourself and knew that the company considered that you were a foreman?

A. Listen, I never was told I was a foreman until last February, a year ago. I never was told I was a foreman.

Q. Never was?

A. No notice sent down there to tell anybody I was a foreman.

Q. You didn't know you were a foreman?

A. Why, I know I was getting a salary, but I wasn't what I would term a foreman either.

Q. Let's go back. You belong to the Union, don't you?

A. I don't know whether I do or not.

Q. At least you did some four or five years ago?

A. Yes, more than that.

Q. And you remember Mr. Seitz, who was your International Vice President? You have testified you didn't know how your pay was set or nobody ever took it up with you?

A. That is right, nobody ever told me.

Q. Isn't it true Mr. Seitz negotiated for you men in the power house?

A. No, sir, he never did, not for us.

Q. Well, how did your salary get set?

A. I don't know. All I know is when we got on a salary the check came down there, and Latteman, the chief engineer, he said, "You are on salary of $185 a month". That is all I knew about.

Q. And that is back in February, 1941?

A. That is right.

Q. And didn't you know that the Union was negotiating for you at that time?

A. I always understood the Union couldn't negotiate for us engineers. I was always under the impression, was made to understand they couldn't negotiate for us.

Q. To refresh your recollection, before February, 1941 there was a considerable question about that. Didn't you ever know about any of the agreements your Union made for you that controlled or concerned you?

A. No, I didn't. They never made any for us engineers. The Union has never done anything for us engineers.

Q. Well, you were a member of the Union, weren't you?

A. That is right.

Q. And you didn't know that the question of changing your salary from an hourly rate over to a salary rate, that the Union had anything to do with that?

A. No, I never did.

Mr. Dittoe: May I ask what Union?

Mr. Smith: It is the Firemen's and Oilers.

Q. Is that the name of the Union?

A. That is right.

Q. The International Brotherhood of Firemen, Oilers & Helpers, Local 198, Elyria, Ohio?

A. That is right.

Q. Well, then, you say you didn't even know you were a foreman?

A. No, sir, not until February a year ago I was told I was a foreman and I would be under a foreman's benefit.

Q. You knew you had been getting foreman's benefit before that?

A. No, I hadn't been before that.

Q. Before February?

A. No, sir. Well, I did for a couple of times; I got engineer's—well, what you call a bonus check; that is all.

Q. You got your bonus checks and you got a different type of insurance?

A. I got what?

Q. Let me read a list of them here: you had the advantage of the group insurance, didn't you?

A. No, sir—well, yes, you mean—yes, sure.

Q. How much insurance do you carry now?

A. $500 I was.

Q. What do you carry now?

A. $1,000 now.

Q. When did you get that changed?

A. I couldn't tell you that. I don't remember when that was changed.

Q. And supervisors are permitted to have twice as much of that group insurance as other employees?

A. As I understand, a supervisor ain't supposed to do so much work.

Mr. Dittoe: I don't think how much insurance these men carry or are allowed to carry is pertinent to their duties or determining whether yes or no, they meet the qualifications of the definitions with which we are concerned. It is purely a matter of company policy.

Mr. Smith: He said he didn't know he was a foreman. I am asking him whether he was getting the emoluments that go with being a foreman.

Mr. Dittoe: They are not within the law. I don't think we are concerned here with whether the defendant permits some of its employees to carry one amount of insurance and others another amount.

The Court: I can't tell yet whether that is the case. You went into the matter of salary. It seems to me counsel should be allowed to cross examine on that subject generally or any other benefits paid.

Q. To get this thing straightened out, do you say that you are a foreman now?

A. No, I have got nothing, only myself; that is all I got to look after now.

Q. From your own point of view are you a foreman or aren't you?

A. Well, I don't know. What would I be a foreman over? That is what I would like to have explained to me. Who am I going to be foreman over?

Q. On your particular shift if you are not the foreman, who is the foreman?

A. Lawrence Latteman.

Q. Is he there on your shift?

A. No; but he will come out any time I will call him; it don't make any difference; he will come anytime I want him.

Q. So on your particular shift you will say that if you are not the foreman, you don't have a foreman?

A. That is right, only like I told you, as far as the power plant, the boiler room, the fireman's license tells him he is in charge of that place; so outside of that I am in charge of my place and that is all, while I am there.

Q. Well, back in July you did sign a paper, didn't you?

A. That is right.

Q. On July 25, 1944 you were one of the men that signed the paper that said, "We, the undersigned choose from henceforth to be regarded as foremen as in the past with foremen's privileges and continue on a salary basis"?

A. That is right.

Q. You signed that along with all the other engineers?

A. That is right.

Q. When you signed that you said you wanted to be continued or regarded as a foreman as in the past?

A. That is right, we said that.

Q. Now, did you mean it?

A. Well, I sure did at that time, yes.

Q. Do you mean it now?

A. Well, if they continue paying like they are now, I would be satisfied, but they wasn't paying at that time. Before that they commenced to pay, before they signed this, they commenced paying the overtime, but before that I wasn't satisfied.

Q. So do I get from what you just said that you were paid properly—

Mr. Reynard: I would like to object to that. It doesn't make any difference if this witness is satisfied or not.

The Court: He has made the statement. I don't know what you are objecting to.

Mr. Reynard: I understood him to ask if he was satisfied.

The Court: No.

Q. As I understand your last statement you were satisfied, since you signed this you are satisfied, because the company is paying you overtime?

A. That is right, they are paying us overtime now there, that is right.

Q. And before that they weren't paying you overtime?

A. Not nowheres near enough, no.

Q. Not enough overtime?

A. No, sir, it really isn't enough yet, as far as that goes.

Q. Well, if you knew that your Union, the Union to which you belonged, and negotiated your salary with the company for you and the other engineers, which included overtime, would that change your idea?

A. Listen, they have never done that. I can tell you that right now. There is never no overtime been included in my salary. I can tell you that right now. I have got no pay check that any overtime has been included in my

check, I think, since last March, a year ago this March, was the only time I ever got it.

Q. Did you know that the Salary Stabilization Division permitted that last year?

A. Nobody ever told me nothing about it. I never knew nothing about that.

Q. Do you know anything at all about how your salary has been fixed or set since 1940?

A. Well, all I know is, asking for a raise since 1940 or '41.

Q. Who did you ask for a raise?

A. We started in on salary and every once in a while we would ask for a little raise.

Q. You say "we would ask for a raise". Who did?

A. Me and Pete Spooner and Latteman there.

Q. How did you start asking that?

A. Well, we would send up to Schmittgen, something like that. I never went up to Schmittgen myself. We sent it through the chief engineer.

Q. Don't your shop committee of the Union handle the raises when you make these contracts?

A. They never got us anything through them that I know of.

Q. Did you ever see any of the contracts the company has?

A. Oh, yes, I have seen a few of the contracts.

Q. Well, do you admit that those contracts governed and controlled your employment out there in the power house as far as the company was concerned?

A. Controlled by what?

Q. By a contract with the Union?

A. That is what we joined the Union for, but I don't know, I can't see where they have benefited me any.

Q. Well, did you know that at the last contract, which was executed with your Union, which was executed in August of this last year, the Union no longer represents your engineers?

A. I never see that contract; I never saw it at all.

Q. I say, do you know that that contract does not cover you engineers?

A. No, I do not. I was under the understanding that it didn't cover us engineers any time; that they couldn't do nothing for us because we were on salary and there was nothing they could do for us.

Q. And you were foremen or supervisors?

A. Yes, that is the way I understand it.

Q. Now, that is the point. You understand because you were foremen or supervisors the Union couldn't do anything for you; is that correct?

A. That is what I understood. I don't know.

Q. Now, going back to your job, you have talked about oiling. About what part of your day do you spend oiling?

A. We don't make any difference about that. You understand I am an engineer. If I oil, I don't care how much or how little oiling, that goes with my job; that goes with the engineer's job; all that oiling, packing, or anything else like that, that goes with my job.

Q. It doesn't take up much of your time?

A. Well, you would be surprised; you can't just over there and look at it and walk away.

Q. We recognize that machinery must be oiled.

A. I mean you can't go and look at it and forget about it. You have to look and see that it is still working.

Q. You have to keep a constant lookout?

A. You have to keep a constant lookout on machinery if you want to keep your job.

Q. Describe the kind of machinery you have there. I assume you have worked in other power plants?

A. A few of them.

Q. This power plant is different than the average power plant, is it not?

A. Not a great lot. It is really the first power plant I worked in with generators.

Q. By that you mean a power plant with generators that generate its own electric current?

A. Yes, that is what I mean.

Q. As a matter of fact this is the only plant in Elyria that does that?

A. No.

Q. Is there another one.

A. Yes.

Q. Which one?

A. Western Automatic.

Q. Those are the only two?

A. That is the only ones I know of.

Q. In addition to that the steam pressure is very important in this particular plant, due to the fact that you are doing plastic molding?

A. That is right.

Q. And those pressures must be maintained constantly, must they not?

A. That is right.

Q. They require a high degree of watching and carefulness to maintain that; isn't that true?

A. That is right.

Q. That is your job to maintain or to see that it is maintained?

A. No; I don't maintain no steam. I have nothing to do with the steam, only to use it when it comes to me.

Q. You use it, but if it isn't there, it is your job to see that it is there?

A. No, it is the fireman's job. That is his job, not mine. I have no business to fire the boilers. I wouldn't know what to do; that is not my job. He is the one who knows whether it needs coal or cleaning or what.

Q. It is your job to see that steam gets to you?

A. No, I have nothing to do with that. If I haven't got steam, I will shut them down.

Q. Have you ever done that?

A. I never have, but if it comes down to that, a lot of time I have helped them fire; I have done that several times.

Q. That was in connection with your job, to see that the steam was up there?

A. No; I wouldn't have had done that if it wasn't there's a war on. I simply wouldn't do it, either, I will tell you that right now.

Mr. Smith: That is all.

RE-DIRECT EXAMINATION

By Mr. Reynard:

Q. I believe, Mr. Page, you said it was as early as last February that you first were told you were a foreman?

A. Oh, it was earlier than that that they put me on a salary.

Q. I understand, but when was it?

A. The first I understood I was a foreman or supposed to be a foreman, that is as I was told.

Q. When you were put on salary? When was that?

A. I was put on salary and that is the first I was told I was really supposed to be a foreman.

Q. When was that?

A. A year ago last March.

Q. A year ago this month?

A. Yes, this month.

Q. Then it was in July, I think you said, you signed this paper Mr. Smith has referred to?

A. That is right.

Q. What were the circumstances leading up to that signing of that paper? Who gave it to you?

A. Why, Mr. Schmittgen was the one that suggested that at a hearing up there; they suggested that.

Q. Who is Mr. Schmittgen.

A. Mr. Bill Schmittgen.

Q. Is he an official of the company?

A. He is supposed to be.

Q. What was said at the time you were asked to sign?

A. Well, they asked us if we wanted to go back on the hourly basis or still stay on the salary.

Q. Was that all that was said?

A. I said as far as everything is concerned now, I would rather stay on the salary.

Q. Then you signed the paper?

A. That is right.

Q. Was that all that was said and done?

A. That is right.

Q. I think you also said one of the Union representatives told you there was nothing they could do for you. Do you know who that was?

A. Well, that come from a committee there, that is all I know.

Q. In the shop?

A. Yes.

Q. When was that?

A. Well, I don't know exactly when that was.

Q. Within the last year?

A. Yes, within less than a year.

Q. I think you spoke of the Western Automatic boiler room in Elyria being also a generator plant?

A. That is right.

Q. Do you know whether the engineers at that plant are paid overtime after forty hours?

(Objection sustained.)

A. I couldn't tell you, no.

Mr. Reynard: That is all.

Thereupon the plaintiff called as a witness

PETER SPOONER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Reynard:

Q. State your name.

A. Peter Spooner.

Q. Where do you live?

A. Elyria, Ohio.

Q. By whom are you employed?

A. General Industries Company.

Q. What is your job there?

A. Operating engineer.

Q. Do you have any other employment at the present time?

A. Yes, I am part time bus driver.

Q. In Elyria?

A. Yes.

Q. What is your schedule of work for the General Industries Company?

A. 10:30 in the evening until 7:00 in the morning.

Q. You have heard Mr. Page testify. Is your job substantially the same as his?

A. Exactly the same.

Q. And you have the same responsibility?

A. That is right.

A. Are there any other engineers on duty at the same time you are on the job?

A. There are not.

Q. Referring to these firemen and coal passers, Mr. Page has mentioned, do you ever hire or fire any of those individuals?

A. I never did yet.

Q. Do you tell them how to do their work?

A. No. I tried to one time. They told me it was none of my business. They told me to get out of the boiler room.

Q. What do you do when you have some problem in connection with these men?

A. Well, I let them settle it themselves.

Q. What happens if, for example, you have occasion to suffer lack of steam or something attributable to their falling down on the job?

A. That happened one time. I had to go down and help them out. I didn't have to I just thought I would to help the plant out.

Q. Is Mr. Latteman your immediate superior?

A. He is.

Q. Have you ever had occasion to call him up during your shift?

A. Well, about twice, I guess.

Q. What was the reason for that?

A. Well, one time the power failed, I called him up to find out what he wanted to do about it. He called up the electrician, sent the electrician over.

Q. What was the other time, do you remember?

A. Trouble down in the boiler room the other time.

Q. What kind of trouble?

A. Between the fireman and his helper.

Q. Did you try to resolve the trouble before calling Mr. Latteman?

A. I tried to but it didn't do any good.

Q. Why did it not do any good?

A. Of course my word didn't amount to much. I wasn't boss down there, they told me, so they took their orders from Latteman.

Q. Coming to your own job, what is the nature of the tasks that you perform on your shift?

A. Well, pack pumps and some minor repairs, a lot of times on electric motors. We have no electrician on that shift, no repairman.

Q. That is, there is no regular rapairman or electrician during your shift?

A. On that shift. They have them on the day shift but not on my shift.

Q. On what basis are you paid for your work?

A. On salary. Then there is some additional straight time added to it after forty hours.

Q. Did any one ever explain your basis of compensation or how your overtime is computed?

A. That is not overtime. That is straight time; nothing overtime. That is straight time after forty hours. That is the way I was told.

Q. Who told you that?

A. Mr. Latteman.

Q. How did he explain that?

A. I couldn't just tell you; it was quite a while ago, but he figured it out for me.

Q. Was it overtime or straight time?

A. No overtime; just straight time after forty hours. There is no overtime to it at all.

Q. Did any one ever tell you your monthly salary included overtime?

A. No, I never heard that.

Q. Were you ever told that your monthly salary was made up of the hourly rate?

A. No, I never heard of that.

Q. Can you tell us a little more in detail just what the nature of your duties are in the engine room?

A. Well, when I get in there, if one engine has been running all day, that is shut down, so there is about an hour or hour and a half work cleaning that up.

Q. What do you do to clean that up?

A. I have to fill the oilers, oil all over, wipe that up, and it takes an hour or hour and a half time. I have to check the engines and the compressors, and feed pumps in the basement, the heating to take care of.

Q. What do you mean by the heating?

A. We have the pumps to take care of the returns from the heating system.

Q. What do you do to take care of that?

A. Two pumps there. They need oiling. Then you have a fan.

Q. What do you do to the compressor?

A. Clean them out; that is about all; keep them oiled up.

Q. Do you have any responsibility for the generators?

A. Certainly.

Q. What do you have to do to keep those in shape?

A. You have to keep them oiled up and cleaned up, not the one that is running, but the one that is shut down that has been running in the day time. They have to be wiped up to keep them in shape.

Q. What do you use to wipe them with?

A. A cloth or rag.

Q. I think you said it took about an hour to clean up the one machine when you first came on?

A. Yes.

Q. About how much more time do you devote to cleaning and oiling machinery generally during your particular shift?

A. It takes half an hour to mop the floor; then spend a good half hour wiping up your engine that is running, and the air compressor. We have a small air compressor to wipe up.

Q. And you do these duties every night on each shift?

A. Yes.

Q. Mop the floor?

A. Yes.

Q. What kind of clothes do you wear?
A. A pair of overalls and blue work shirt.
Q. Do you change clothes when you go on the job and leave the job?
A. Yes.

Mr. Reynard: That is all.

CROSS EXAMINATION

By Mr. Smith:

Q. How long have you been with the General Industries Company?
A. I believe it is going on nine years.
Q. Do you remember when your pay was changed from an hourly rate to a salary rate?
A. Yes, I do.
Q. At that particular time you were a member of the Union, the firemen and oilers union?
A. I don't know for sure whether I was a member or not.
Q. But at that time did you know that the Union was negotiating for all the employees in the power plant?
A. I don't know a thing about that.
Q. Did you ever discuss these problems with the shop committee or your Union business agent?
A. No; I didn't have much to do with the Union.
Q. But you did know that the Union had a Union Shop Committee in the boiler room?
A. Yes, I did.
Q. And that they were negotiating with the company with reference to working conditions, contract, and so forth, and so on: you knew that?
A. In reference to the boiler room, yes.
Q. Did you know that there was a controversy between the company and the Union as to whether or not the engineers could belong to the Union because they were foremen?
A. Well, I heard of it; whether true or not, I never found out. I don't know.
Q. You do know there was that controversy?

A. Yes, there was something about it; I heard something about it.

Q. Did you ever see the contract between the company and the Union involving the power house employees?

A. Yes.

Q. Do you recall in that first contract back in 1940 and the other contract there was a clause the National Labor Relations Board would be the final judge whether you engineers were foremen or not?

A. No.

Q. You don't remember that?

A. No.

Q. You did recognize that you were a foreman, did you not?

A. No, I didn't.

Q. Well, are you a foreman now or aren't you, from your point of view?

A. Well, I don't think, really, I don't see how we can be, if we can't hire anybody, we can't fire; we can't go down there and tell them what to do, because if they feel like it, they will do it, and if they don't they won't; so how can we be a foreman that way?

Q. Do you know anything about the relationship between a fireman in a boiler house and engineer?

A. About what?

Q. The relationship? Is there any jealousy there between them?

A. No, I don't think so.

Q. Do firemen ever resent taking orders from an engineer?

A. No, I don't think they do. They take the orders if they know they are supposed to, but they never got orders to take orders from the engineers that I know of.

Q. Well, if you are not the foreman down there, who is, or is there one?

A. There is not any. They know what they are supposed to do, and I know what I am supposed to do, and that is the way it works.

Q. And the company has nobody supervising or acting as a foreman?

A. Not on the second or third shift.

Q. But they do on the first?

A. That is right.

Q. Is there any difference in the work on the first, second, or third shift?

A. There is a lot more going on on the first shift; that is the only difference.

Q. How do you explain your signing of this memorandum on July 26: "We, the undersigned, choose from henceforth to be regarded as foremen as in the past, with foremen's privileges and continue on a salary basis"?

A. Well, I thought the company decided to make us foremen then, but I found later that we was no foremen, from what went on down there; what we had to say didn't amount to anything.

Q. You never knew anything about all the trouble that had been going on five years before of the company contending all along the road that you were foremen?

A. No.

Q. You didn't know anything about that?

A. No, we weren't foremen; at least I didn't know anything about it that we was.

Q. Of course your Union was contending that you weren't foremen and you could belong to the Union?

A. That we weren't?

Q. —foremen. Yes, did you know that?

A. Will you repeat that question?

Q. I say, did you know that the Union was contending back in 1940 and all the period for the next four years that you engineers weren't foremen and therefore could belong to the Union; did you know that?

A. I don't know about that.

Q. And you didn't know that the controversy was that the company insisted that you were foremen and therefore couldn't beleng to the Union; you didn't know that?

A. I didn't know that, no.

Q. You do know that foremen in the plant are extended certain privileges that production workers are not given?

Mr. Dittoe: I would like to have the same objection to that I have voiced on previous occasions.

A. That is right, I believe.

Q. And you do know that over the period of years you have been receiving the same benefits and consideration that every foreman in the plant has received?

A. How many years did you say?

Q. Well, since 1941, is what I am interested in particularly, from February, 1941.

A. It might be that long, but I don't know whether that long or not.

Q. I am talking about the time when you went from an hourly rate of pay to a salary rate of pay. From that time on did you receive all the other benefits every foreman had?

A. I wouldn't say yes to that. All we received was the company's bonus check for Christmas. What the other foremen got I don't know.

Q. But you have had sick leave in that period of time?

A. Well, I wasn't sick. I was lucky I wasn't sick.

Q. I mean if you were sick you would be paid whether you worked or not?

A. Yes.

Q. And how much insurance do you carry of the group insurance?

A. I don't know. Every employee in that factory gets that insurance. We aren't the only ones that get it.

Q. That is right, all production workers.

A. They get it, too.

Q. They are able to take $500 and the foremen are permitted or able to take $1,000. Now, which do you have?

A. $1,000.

Q. You are also in on the pension plan or benefit set up for the supervising foremen force?

A. Yes.

Q. Do I understand, did you testify substantially the same as Mr. Page that you don't know how your pay was set, your salary, or what it included?

A. I don't know a thing. We got a notice down there we are on salary; that is all we knew about it. We didn't hear any more about it; there was no more said about it.

Q. So you don't know what your salary includes?

A. Not a thing. There was nothing said about it, not a word.

Mr. Smith: I think that is all.

RE-DIRECT EXAMINATION

By Mr. Reynard:

Q. Are deductions taken from your pay for the insurance premiums and the pension plan you just spoke about?

A. No, they are not.

Q. This statement you signed to which Mr. Smith has referred, something about your continuing as foreman as you had before, can you tell me something of the circumstances under which that was signed?

A. Well, I thought maybe they decided to make a foreman out of us, is the reason I signed that.

Q. When did you sign it?

A. Well, I don't remember the date.

Q. Where was it signed?

A. Well, mine was lying down on the desk down there and I signed it.

Q. Down in the engine room?

A. In the engine room, that is right.

Q. Did anyone ask you to sign it?

A. Well, Mr. Bader, I believe, asked if we would sign it.

Q. Did he say anything about it or what it was for, why he wanted it signed?

A. No, he didn't say a thing.

Q. Were you given a copy of it?

A. Yes, I think I got a copy.

Mr. Smith: That is all.

Thereupon the plaintiff called as a witness

FRED STEGMAN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Reynard:

Q. What is your name?
A. Fred Stegman.
Q. Where do you live?
A. I live in Elyria.
Q. Where do you work?
A. General Industries.
Q. What is your job there?
A. Well, my job is operating engineer.
Q. How long have you worked for that company.
A. Well, I have been there forty years.
Q. Have you been an operating engineer all those years?
A. Yes. I was Chief Engineer at one time.
Q. That is the job that is now held by Mr. Latteman?
A. Yes, sir.
Q. How long ago was that?
A. That is about four years ago.
Q. Why did you give up that job?
A. On account of my health; I had to give it up.
Q. You decided to take a job as a regular engineer. What is the difference between the two?
A. Well, that is avoiding all responsibilities.
Q. In the job you presently have you avoid all responsibility?
A. Avoid all the responsibility; that is right.
Q. What responsibilities does the Chief Engineer have?
A. Well, he is responsible for having the plant to run at all times.
Q. That is, he is on call 24 hours a day?
A. Yes, sir.
Q. What is your specific job; what do you do?
A. Well, my job is operating, repairing, cleaning, taking up bearings, everything in general.
Q. Do you do the repairing work yourself?

A. Oh, yes.

Q. Where does the steam power come from used by the engines in the engine room?

A. The steam comes from the boiler room.

Q. Who works down in the boiler room?

A. The firemen.

Q. Do you have any supervision over the firemen?

A. Not a thing now.

Q. You say "now". Did you ever have over the firemen?

A. Oh, yes.

Q. When was that?

A. When I was chief engineer.

Q. That is his job to boss the firemen?

A. Yes.

Q. Who is your immediate boss,—Mr. Latteman?

A. Well, I work under Latteman, yes. Mr. Schmittgen is really our boss, but I work under Latteman.

Q. Is he on the shift at the same time you are?

A. Yes, he is on the same shift I am.

Q. You work the same shift?

A. Yes, sir.

Q. Do you change about to different shifts with the other engineers?

A. Myself, no, I don't shift over.

Q. Do you make any recommendations as to the hiring or firing of the firemen or coal passers?

A. No, I don't do that no more.

Q. You heard these other two gentlemen testify, Mr. Page and Mr. Spooner. Is it your testimony your job is pretty much the same as theirs?

A. About the same, only I do more the repairing because those fellows, they are there just all alone, where on my shift there is two of us.

Q. Tell us about the repair work you do, what type or form of machinery do you repair?

A. We do packing, if we have any breakdowns, put in new parts.

Q. What breakdowns?

A. Oh, have a piston break; the piston rings break, take them out and replace them.

Q. You do that yourself?

A. Oh, yes.

Q. You use the tools and equipment?

A. Use the tools and equipment, sure. All we need are the new parts, and we repair them.

Q. You say you are able to do more of that than the other men because the chief is there with you and these other men are just there alone?

A. Yes, there is just one alone where there are two of us on that morning shift, and we see that that is all done.

Q. How are you paid for your work?

A. I am paid by the month.

Q. Do you get any extra compensation for the hours you work over forty a week?

A. No, I don't get nothing extra.

Q. Has any one ever told you your salary included overtime?

A. No; that is what we lack there. If there is extra overtime to work, we work but we don't get paid for it no more.

Q. You heard these other two men say they signed the statement and they wanted to continue to be considered foremen as in the past. Did you sign such a statement?

A. I signed one.

Q. Can you tell us a little bit about what happened when that was signed,—who asked you to sign it?

A. Mr. Schmittgen.

Q. Were you in the engine room or called to his office?

A. I was called to the office.

Q. What was said at that time?

A. He just told me to read it over. I read it over and I just signed it.

Q. Do you remember when that was?

A. I don't just remember; two or three years ago, I guess.

Q. I think you said you worked the day shift. What time do you begin?

A. From six in the morning until two in the afternoon.

Q. Have you ever worked beyond that time in the afternoon?

A. Well, in case of emergency you have to do it.

Q. How offen do you have an emergency?

A. Well, not very frequently.

Q. Do you get any extra pay for that?

A. No, no extra pay.

Mr. Reynard: That is all.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Stegman, you say you worked for this particular company for forty years?

A. Well, not for the General Industries alone. I worked there for three different companies. I worked for General Industries since they have been there, but I have been at the same plant that long.

Q. How old are you?

A. I am 65.

Q. In other words, you have been associated with this company since those buildings have been built down there?

A. Yes. At the same place there, yes, but not the same company.

Q. In other words, you lasted longer than the company?

A. Yes.

Q. How long were you chief engineer?

A. Well, let's see: 35 years or better.

Q. And during that period of time did you get any reactions from your experience from the relationship of engineer and fireman in the same power house?

A. What do you mean?

Q. Are they always congenial or willing to take orders?

A. Oh, yes, they will take orders from the right man.

Q. Now on, we will say, the second shift, who is in charge of the power plant on the second shift when Mr. Latteman isn't there?

A. Latteman is in charge of the power plant 24 hours a day.

Q. Even when he is not there?
A. Yes, sir.
Q. And nobody else?
A. Oh, no. He is in charge all the time.
Q. Are you trying to say that the engineers have not been considered as foremen?
A. Well, I don't think they are foremen. They are operating engineers.
Q. Have they been considered as foremen by the company?
A. Why, I think they have, lately.
Q. When you say lately you are talking back to the time at least when they were put on a salary?
A. It might be.
Q. But it is true generally that firemen because they have a license are a little reluctant to take orders from an engineer just as an engineer?
A. Well, I am afraid to say in our case they don't; they look for orders from the chief engineer.
Q. And if he is not there?
A. Well, they ought to get him.
Q. I mean suppose you couldn't get him?
A. Well, you ought to get him.
Q. Then the fact that you have signed this statement saying you wanted to remain a foreman as you had been in the past, that word "foreman" was just a word and didn't mean anything: you had no other responsibility?
A. Well, he is responsible for keeping his trick going.
Q. So he does have some responsibility?
A. Just his trick is all. He must keep that going. He is responsible for not running hot bearings.
Q. Why is it you wanted to be and remain a foreman?
A. Why do I?
Q. Yes.
A. Why, I always was a foreman there.
Q. Is that the only reason why you wanted to stay, because you always were one?
A. I had been hired, I wanted to remain that way, that is all.
Q. You were chief engineer for many years?

A. Yes.

Q. You certainly were not a foreman when you gave up the chief engineer's job?

A. I wasn't chief engineer any more.

Q. Did you become a foreman?

A. No; operating engineer. That is all I call myself, operating engineer.

Q. But I mean in your paper you said you wanted to remain a foreman as you had been in the past?

A. Yes.

Q. Why?

A. Well, you can't have two foremen on the same job.

The Court: He asks, why did you want to remain a foreman?

The Witness: Well, because they asked me to sign that, and I simply signed it.

Q. You have taken all the benefits that a foreman is given, haven't you?

A. Yes.

Q. You get sick leave if you are off; you get paid?

A. Yes.

Q. You get a monthly vacation plan, different plan, than the other employees?

A. I don't know as I get any better.

Q. You get more group insurance?

A. Well, than the other employees you mean?

Q. Yes.

A. I think so.

Q. And you have a pension plan, you belong to that?

A. Yes.

Q. That is only available to foremen and supervisors, isn't it?

A. Yes.

Q. You have taken all those benefits, haven't you?

A. No.

Q. And you say you thought you never were a foreman?

A. Not now. I am not a foreman now.

Q. Well, why did you take all those benefits and why

did you say when they asked you whether your wanted to be a foreman or an hourly rate employee, why did you say you wanted to remain a foreman?

Mr. Reynard: I object. Counsel is arguing with the witness. This man said they are not foremen.

The Court: In that case, I might ask that: What would you say a foreman is?

The Witness: Well, a foreman is a man who gives orders to men under him.

The Court: Now then, when you talk about foremen you are talking about rate of pay, the salary, and things of that kind?

Mr. Dittoe: I think more than anything else Mr. Smith is talking about certain benefits, such as $500 extra life insurance the company has seen fit to confer on a certain group of employees, as has been mentioned. I think it has no connection with this case at all.

The Court: We cannot stop to argue it now. Let's get all the facts.

Q. When you relinquished your job as chief engineer down there, is it true that you taught Mr. Latteman how to be chief engineer down there?

A. Well, he worked under me before he was chief engineer.

Q. Did you give him the benefit of all your advice and experience in that plant?

A. That is right.

Q. And Mr. Latteman relied to a great extent upon you for helping him in his job as chief engineer and still does?

A. Well, that was the understanding, I was to help him along, which I do.

Q. During the course of that do you say you have never since Latteman was there given orders to anybody?

A. Me give orders?

Q. Yes.

A. No, I don't give no orders when he is there.

Q. I mean whether he is there or not, have you given any orders?

A. Well, if he is on vacation I just take his place there, that is all.

Q. Have you given any orders when he was away?

A. Well, then when he is not there, I give orders, yes.

Mr. Smith: That is all.

RE-DIRECT EXAMINATION

By Mr. Reynard:

Q. You gave your definition of a foreman, which probably is a pretty good beginning. Who would you say is the real boss in that power plant, including the engine room and boiler room?

Mr. Smith: I object.

The Court: He may answer.

A. Well, Mr. Latteman is foreman, and he is responsible at all times.

Q. And during what period of the day is he boss or foreman, during what specific part of the day is he boss? Is he boss on one trick or another trick?

A. He is boss on all tricks.

Q. Is there ever an occasion for any one else in the power plant to serve as boss?

A. Not as long as he is there.

Q. When is he not there?

A. He leaves there at four o'clock in the afternoon, but he is always subject to call.

Q. Is there any period of time that he is not subject to call?

A. He is always subject to call at any time.

Mr. Reynard: That is all.

RE-CROSS EXAMINATION

By Mr. Smith:

Q. That power plant is operating and open seven days a week, isn't it?

A. Yes, sir.

Q. 24 hours a day?

A. Yes, sir.

Q. You are testifying here that Mr. Latteman is the only boss there and that he is on the job or subject to call every hour of the day, every day of the week?

A. He is not on the job at all times, but he is subject to call at any time.

Q. Seven days a week?

A. Seven days a week.

Q. He has got a great job, hasn't he?

A. Well, I had it for thirty-five years.

Mr. Smith: That is all.

Thereupon the plaintiff called as a witness

CLARENCE PAYNE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Reynard:

Q. State your name.

A. Clarence Payne.

Q. Where do you live?

A. Elyria.

Q. By whom are you employed?

A. General Industries Company.

Q. What is your job there?

A. Assistant paymaster.

Q. How long have you had that job?

A. Eight years.

Q. Who is your immediate boss?

A. The paymaster, L. J. Monroe.

Q. And what are your general duties?

A. In the payroll department we have what is known as tabulating equipment which is a system of bookkeeping by means of punched cards. De have electrical machinery in interpret these punched cards into various reports, payrolls and checks.

Q. Is that what is commonly known as I.B.M. machine?

A. That is right. And the majority of my time has been spent on setting up and operating the machines.

Q. Do you have any employees under your direction?

A. I have two assistants that have been working with me in the tabulating department, since 1943. Up to then I worked it with one man; previous to that alone.

Q. Are there any others in the department?

A. Six punch girls; the paymaster having the majority of authority over them.

Q. Coming to the employees subject to your supervision, what supervision do they require?

A. Very little.

Q. What do you do in the way of supervising or instructing them?

A. The only actual supervision would be in a case of where they would be punching one type ticket and I asked them to change and punch another type.

Q. Do you actually change the machines?

A. No.

Q. Approximately how much time do you estimate you devote to that supervision?

A. Oh, of course, it is intermittently, probably about an hour and a half a day is all that would be consumed in such a job.

Q. How many hours do you work a day?

A. 8-3/4.

Q. What do you do in the remaining part of the day?

A. That is spent in, at least half a day, actually manipulating the machinery. The balance of the division of the day would be making out various reports concerning old age, various state reports, unemployment insurance reports.

Q. What is involved in making out the reports?

A. Just routine clerical job.

Q. Is it something where you must exercise some independent power of discretion or merely copying work?

A. It is merely checking.

Q. What do you check?

A. Earnings against various earnings cards to make sure the salaries are correct.

Q. Those earnings have been prepared by someone else?

A. That is right; just routine.

Q. You check one against the other?

A. Yes.

Q. I think you said you spent about half a day in the actual manipulation of the machinery and the balance of your time preparing these reports?

A. Yes.

Q. What is the operation in the manipulation of the machinery?

A. That involves changing the various types of plug boards to control the mechanism to cause the reports to be printed or multiplied, extended straight out.

Q. In other words you set the machine so it makes the holes?

A. The girls make the holes. I make the adjustments on the machinery to cause the printing.

Q. Is there anybody else in the office does that same kind of work?

A. At the present time I have two assistants.

Q. Do they do the same identical work you do, you have described as manipulating the machinery?

A. That is right.

Q. To sum it up you spend about an hour and a half in supervising the two girls under you, about half a day in manipulating the machinery, and the balance of the day getting up the reports which you speak about?

A. That is right.

Q. You work 8¾ hours a day, how many days a week?

A. Six days. The last day we only work 4½,—a 48-hour week. I am paid on the basis of salary, 40 hours, plus additional eight hours as extra time. If I work fifty I would only get 48 hours straight time.

Q. Straight time for the hours between 40 and 48?

A. That is right.

Q. Nothing for the time you work beyond that?

A. That is right.

Q. Are there any occasions when you worked beyond the 48 hours?

A. Not lately.

Q. Have there been?

A. Since 1943 we work 48 hours. Up to then we had been working overtime to the extent of two or three hours a week, for which I received no compensation.

Q. Now, you said you had two girls under your direct supervision.

A. Two men.

Q. Do you hire and fire those people?

A. No, sir.

Q. Who does?

A. Mr. Monroe.

Q. Do you make recommendations to him about either hiring or firing?

A. I might suggest a man was good or bad, or something and he would probably act upon it.

Mr. Reynard: I have no further questions.

CROSS EXAMINATION

By Mr. Dill:

Q. Do you recall I came out to the factory one day?

A. Yes, sir.

Q. And you very generously showed to me the type of work that is required in running an I. B. M. machine,—you called it a tabulator?

A. Yes.

Q. And explained to me in a brief way some of the problems you are faced with in operating that machine?

A. Yes.

Q. Would you tell us how many operators of I. B. M. machines of the type you have in General Industries there are in Cuyahoga County, roughly?

A. Probably three or four hundred.

Q. What was your experience before you came to General Industries Company?

A. Well, I have been there twenty years. I had no experience along that line.

Q. How old are you?

A. Forty.

Q. You started when you were twenty years old, is that right?

A. Yes.

Q. Have you since that time continued to prepare yourself by going to school or taking courses, or things of that sort, or have you stopped learning from the time you were twenty except through experience?

A. Just through experience.

Q. You have made no studies of any kind about any other subjects than the work you are required to do?

A. No, sir.

Q. So that all the knowledge you had about subjects other than you are required to know to operate this machine you knew when you were twenty years old?

A. I just had a general high school education up to that time and what I have learned concerning the operation has been practical operation in the shop in regard to the sales reports, and so forth.

Q. So you haven't supplemented your high school education for the last twenty years with any independent study of things; is that correct?

A. Yes, sir.

Q. Can you tell me what ordinary operators of these I. B. M. machines earn, their average rate of pay?

A. I would hazard a guess about $300 a month with overtime.

Q. What if they didn't have overtime, what if they worked a 40-hour a week, what would it be?

A. At least in Elyria, operating with the 40-hour week, some of my colleagues were getting $240 while I was getting $215.

Q. With overtime?

A. Without overtime. Basic rate basis.

Q. So you consider you are underpaid for your work?

A. Yes, sir.

Q. You say the work you have to do at the General Industries Company is strictly a routine operation. Now, by the use of the word "routine" you mean, of course, it doesn't require any judgment, it is something that is a repetition, just like the stenographer who automatically puts down what I am saying and doesn't think about it particularly?

A. Yes.

Q. That is the type of operation.

A. After one is acquainted with that type of operation it no longer requires a great deal of thought.

Q. How long does it take to get acquainted with that type of operation?

A. Well, I learned it when the installation was made,—the I. B. M. sent out a man about 3½ or 4 weeks, and I carried on beyond that point.

Q. So you knew all you had to know about the operation in that four weeks.

A. Basic principles.

Q. After that it was purely routine?

A. After that it was just development.

Q. I will hand you what is marked Defendant's Exhibit A and ask you what that is?

A. That is a plug board chart, for a type of report to be run on the tabulator.

Q. Where did that come from?

A. Under very extenuated circumstances it came from our office.

Q. Regardless of the circumstances, you gave it to me?

A. That is right.

Q. I asked you what you had to do to set up the machine and this is what you gave me to illustrate that; isn't that true?

A. Yes.

Q. Now, it shows maybe a thousand different entries or circles here of connections?

A. Yes, sir.

Q. How many are there on that chart?

A. I wouldn't attempt to tell you.

Q. It may be a thousand?

A. Yes, it is possible.

Q. How many variations can you have in setting up the connections on this plug board—millions?

A. I wouldn't say millions.

Q. Many thousands?

A. There are many types of combinations you could have.

Q. Tell us what these various lines in red and blue connected with various circles mean?

A. The purpose of that is an inexperienced operator or operator who sets up the board, say once a month, isn't familiar with it, couldn't set it up by recollection and this chart will indicate from what positions the columns or punch information are wired up, something similar to an adding machine which accumulates the totals in various columns and causes the machine to print in various typing.

Q. You are the one who sets up the plug boards?

A. Yes, sir.

Q. How many different plug boards have you been called upon to design or set up in, say six months?

A. At the present time we are not making any new developments; we would probably use the routine boards we have. They were originally set up according to the requirements from the auditing department, whatever they required.

Q. There would be a different plug board for each requirement?

A. Yes, each type of report, depending on the type of business.

Q. You set these plug boards up to give detailed sales analyses?

A. That is right.

Q. Also set them up for detailed cost information?

A. The boards were drawn simply as reference; they were invariably set from memory.

Q. You had to make a new plugboard for each type of report you had to make, and that involved sales analyses, cost analysis and information, and so on?

A. When we started the operation it started only with labor and we gradually worked into costs and other reports.

Q. You have time cards like these that may have a thousand entries on them.

A. 280 columns, each column has 80 possible punches.

Q. Then you had two sets of cards for day work time tickets and piecework time tickets?

A. That is right. The original installation was labor only.

Q. Also you are required to work out a plug board to tabulate the information on what is called the check card.

A. That is worked in conjunction with the day work and piece work.

Q. That determines what earnings the people get.

A. Yes.

Q. And the way you set it up determines how much pay they get?

A. Yes.

Q. Any little mistake on that would cost the company a little money?

A. That is right.

Q. What is the payroll of the company?

A. Payroll period weekly runs around $50,000.

Q. $50,000 a week and 52 times for a year.

A. Yes.

Q. And the accuracy of that depends on how you set up the plug board and work out these various tabulating columns?

A. Yes, sir.

Q. Then you branched out into an inventory or cost record, not strictly inventory record or cost record, for all the material charged into inventory and all the material charged out?

A. Yes, sir.

Q. Then you have cards called purchase voucher records, material requisition and scrap record, and those have to be set up on plug boards like you do for the earnings?

A. Yes.

Q. And the basis of the setup on the plug board will determine what your corporate record will be as to how much it costs them to manufacture any product they make?

A. Yes.

Q. And the accuracy of that is important in determining what their costs have been?

A. Yes, sir.

Q. So in that sense, the records you tabulate are the

basis for the quotations made by the company for the job?

A. Yes.

Q. In addition to that you branched out into the sales analysis records?

A. Yes.

Q. You had to make up a plug board for that. What do you mean by sales analysis?

A. It is a report showing the various sales according to product, and their relation to costs.

Q. How many products are involved?

A. Only actually about twelve products.

Q. How many different variations of those twelve products do you have to keep record of?

A. Four or five.

Q. And that is a report that goes to executives of the company to determine how their sales are going; is that right?

A. Yes.

Q. Now, in addition, there are prepared certain reports for the government. What are those reports?

A. Social Security, State Unemployment Insurance, what were known as W-15, Income Tax Reports.

Q. You are the one who prepares those?

A. Well, I have assistants.

Q. Is that purely routine?

A. Routine in the sense the sales reports are gotten up every month, labor every day, certain periods for reports.

Q. You are in charge of the preparation with your assistants?

A. Well, yes.

Q. You were the one the factory representative trained at the outset, he gave you about four weeks of training?

A. Yes.

Q. Will you say that is all the time it took?

A. As I say, I had the basic elements after three or four weeks, and I took it from there myself.

Q. Didn't the representative of the company come out and assist you in learning the job over a period of years?

A. No, sir; that was only routine salesmen from the

organization trying to sell more equipment; more work the more equipment they sell.

Q. There was a man that came out to see you regularly each week over a period of six months?

A. Well, yes.

Q. You were trained new; you never saw an I. B. M. machine before that?

A. I never heard of them.

Q. It is a big machine, as big as this table?

A. Pretty near.

Q. It has all sorts of connections, you said over a thousand connections for separate setups; is that right?

A. Yes.

Q. You must have a pretty good memory if you can remember a thousand different setups?

A. No, not a thousand different setups.

Q. You have to work them out?

A. You can work them but in your mind you visualize where you want the information printed and where you want it picked up: you do it mechanically.

Q. How many men does it take to constantly be at the machines as they are operating eight hours a day?

A. At least two out there all the time. One comes in at noon. It leaves two in the morning for I work out in the morning till noon, and he works with my assistant till quitting time, the other works with him until evening.

Q. You say you only spend an hour and a quarter a day on supervision, the other time you do exactly what the other two do.

A. As they do and the routine clerical checking work on the payroll.

Q. Do they get paid as much as you do?

A. I venture to say my assistants, with their overtime, get more than I.

Q. Their salary isn't as high?

A. Their basic salary, no.

Q. They aren't entitled to certain perquisites of a supervisor?

A. What do you mean by perquisites?

Q. They don't get any sick leave?

A. They do. Every salaried man gets sick leave. Every salaried employee also gets insurance of $1,000.

Q. How about pension?

A. Every salaried man gets that; it is not restricted to foremen.

Q. But it is restricted to salaried people?

A. That is right, salaried people.

Q. I hand you Defendant's Exhibit B and ask you what that is?

A. This is a copy of a letter which I wrote asking the Wage and Hour Division to clarify my status in regards to whether I am covered by the Wage and Hour Act or whether I am not.

(Letter read).

Q. When did you first learn about the Little Steel Formula?

A. Common knowledge from reading the papers.

Q. If you prepared all these reports on Social Security where did you learn about that?

A. That is part of my job.

Q. And Workmen's Compensation; did you have anything to do with that?

A. We make out reports.

Q. Where did you find out about that law?

A. We have documents covering it in the payroll department and we make out reports giving them the information required.

Q. Then you say your job is strictly a routine clerical job that requires no judgment and no independent discretion; is that right?

A. Well, I wouldn't claim that. I do claim more than twenty per cent of my work is manual labor; it is not supervisory.

Q. Where did you find out about 20% or more?

A. I got a book from the Wage and Hour stating the definition of the law; who was exempt, who was covered.

Q. Did you have at the time you wrote this letter?

A. That came back as an answer to that letter.

Q. You then say on the basis of that you are a routine clerk doing a routine operation, all but an hour and a

quarter spent in just supervising some clerks in punching cards: do you still stick to that statement?

A. Yes, as far as the court, the question is concerned here.

Q. The date of this letter is June 6th. After you wrote that letter did you tell Mr. Marsh about it?

A. I never had a conversation with Mr. Marsh.

Q. Never in your life?

A. Never.

Q. Who did you tell?

A. I talked to Mr. Russert. He said, "I hear you have written into the Wage and Hour", something of that sort.

Q. Isn't it a fact the company thereafter wrote to the Wage and Hour Administrator?

A. I believe so. I was told by their Labor Stabilizer they had.

Mr. Dill: That is all.

Mr. Smith: I would like to offer in evidence these cards referred to, C to I, inclusive.

Mr. Reynard: I would like to have the record show, Exhibit B is a letter to the Department of Internal Revenue, rather than Wage and Hour Division.

We could delay our re-direct until tomorrow morning.

The Court: That will be better.

(Adjournment).

(At 10 A. M., March 23, 1945, the trial was resumed.).

RE-DIRECT EXAMINATION

OF MR. PAYNE

By Mr. Reynard:

Q. Mr. Payne, you testified at considerable length yesterday afternoon about setting up this I. B. M. machine and making the various adjustments in the plug boards, and you testified also about the purpose for which they were set up. I believe among other things you mentioned they were for the purpose of making various cost analyses and sales analyses and labor cost studies, and that sort of thing.

A. Yes, sir.

Q. Now, tell me whether or not you yourself determine the various factors which are taken into consideration in making those studies or whether that information is given to you with the instruction merely to adjust the machinery to print, as I think you called it, the certain items?

A. That is the procedure had been set up by a firm of industrial engineers, as far as the accounting procedure was to be run; I merely created the report as they wanted it.

Q. That is, the accounting firm you speak of, they issued the instructions as to the costs of items to be considered, and you are merely told what impressions are to be made on the card and to adjust the machinery to make those impressions?

A. That is right.

Q. Now, in preparing the machines and running the cards through the machines for the purpose for which you are instructed, approximately what percentage of the time involved would be devoted to setting up the machine and what part to actually running the cards through the machine?

A. It is a concurrent operation. While the machine is printing the report we are assorting the cards for the next report, or doing the various operations. So while one machine is running another is set in operation; it is not a case of standing there and waiting for it to make the run complete.

Q. What is done between the time of sorting out the cards and setting the machine?

A. That is handled by another machine, a sorting machine which gets the cards in sequence according to their various accounts, how they are to be printed. In other words, there is more than one type of cards being handled through the tabulating department at a time.

Q. Could you estimate the percentage of time you devote to setting up the machine and the time you spend in other duties?

A. The actual setting up would vary with the report.

A simple report could be set up in ten minutes, a more complicated one in twenty minutes.

Q. Can you say, on the average, what the distribution of time would be as to time consumed in setting up the machine and time consumed in running the material through or in performing the other operations?

A. The setting up probably for all the different operations would amount to an aggregate of a couple of hours, setting up the printing machine, plug boards, and so forth.

Q. How much time would you spend sorting and punching the cards for a re-run?

A. That, of course, varies with the things required off the cards, the number of sorts to be done. You understand in this system a part number or an account, we will say, is to be sorted out by that part number or account. It requires one sorting for every column that is punched. For part numbers it will run nine columns, an account will run seven columns. There is sixteen columns, and if you have three thousand cards, they go through the sorting machine sixteen times, one sort for every column for the total number of cards. So it is rather difficult to answer just exactly how much time would be on the sorting machine itself other than preparing the actual report on the printing machine.

Q. You do that work yourself?

A. Yes, sir.

Q. Do any other employees of the company do that kind of work?

A. These two assistants there.

Q. Now, are these records which you prepare checked by anyone else other than yourself?

A. Oh, yes, the check is on payroll, or balanced against the payroll before any checks are given, but there is no chance for error between the printing of a check and the running of payroll.

Q. Who makes out that check?

A. The paymaster. He knows the payrolls are in balance before any checks are given out.

Q. So any mistakes you might make would be caught by him?

A. Yes. As far as sales are concerned and voucher distribution, they are caught by the auditing department.

Q. In other words, you just do the mechanical work in connection with this machine?

A. That is right.

Q. Matters of what elements are to be taken into account and the appraisal of that information is done by the other departments?

A. That is right.

Q. Now coming to the question of insurance and old age pensions, will you tell me if you know, which of the company's employes are entitled to participate in those benefits?

A. You are speaking of what is termed the company life insurance or the company pension fund?

Q. I am not entirely familiar with it. Tell us what that is?

A. The company pension plan, as I understand it, covers all salaried employees. The pension plan is based on their salary. They have to be with the company five years before they are eligible for it, and the pension paid is based on their salary grouping and the results of insurance premiums along with the pension fund.

Q. And that is available to all salaried employees?

A. That is right.

Q. Is that with or without regard to their exempt status as foremen?

A. That is right, as far as I understand.

Q. That is, in other words, any nonexempt office employee who is on salary is entitled to participate provided he meets the other requirements?

A. That is right.

Q. In connection with social security and unemployment, these reports, you testified yesterday I believe, consist principally of checking payroll sheets with some other cards showing earnings. Can you tell us a little more about that, just what is involved in the preparation of those reports?

A. When I mentioned checking before I mentioned it with the intent of implying there is a great deal of check-

ing operations performed as they balance against earnings. For instance, we run what we call a daily earning statement by clock number, showing the hours, and so forth, a person puts on a certain job, how much he has made that day. That has to be checked against his attendance cards to prove his eight hours of earnings, and that is checked on the clock. That is done every day and I do a good deal of that.

Q. That is done to check the mathematical accuracy?

A. That is right, and to check any errors that might have occurred in the hours or rate.

Q. What is there in the preparation of reports that would require any detailed knowledge of the laws involved, that is, social security and workmen's compensation?

A. None beyond the extent a payroll department must have always available information of the percentage to take for various things, and what reports we are supplied with, so it is just a matter of setting up the things to print on the forms.

Mr. Reynard: That is all.

RE-CROSS EXAMINATION

By Mr. Dill:

Q. Mr. Payne, I think you testified on redirect that you cannot make a mistake because all your work is checked; is that right?

A. That is right.

Q. By someone else?

A. That is right.

Q. But you said at the same time a lot of your work is checking your own work against, at least, daily payroll report against the employee's time card?

A. That is right.

Q. So you do check there rather than have someone else check?

A. In that case.

Q. If you get the wrong rate when they are working long hours with overtime rates of time and a half, you

may be the cause of paying employees a great deal more money than they have earned; isn't that true?

A. There is, of course, possibility of error that way, but the payroll itself would be out of balance.

Q. But between employees you may get the whole thing mixed up, the only check you make against the machine is the total payroll against the total accumulated pay in the machine?

A. That is right, and the daily payroll checks.

Q. If you get the individuals mixed up and you don't know the various amounts paid for the various jobs in the factory or hours put in by the various people, you may very well over pay some people and under pay others?

A. That is possible.

Q. Is there anything in your experience that causes employees more anguish and more hostility and more trouble than not getting paid the right amount?

A. There is not.

Q. In fact in your own case you feel that has not been done?

A. That is right.

Q. Consequently, if your work for the company in taking care of these payroll earning statements should fall off and become slip-shod, you might well cause a lot of dissatisfaction amongst the help?

A. Not any more than a mistake would happen in the sales department in making a typographical error in an invoice; that is a hazard of every occupation.

Q. So you have that responsibility, don't you, among others, in operating this department?

A. Yes, sir.

Q. It is also true in setting up this machine for tabulating information for various governmental reports, you at least have to know something of what is required by the Social Security Act?

A. As I explained that is under Mr. Monroe.

Q. You have to know it, too?

A. He has to tell me what he wants.

Q. You have to know, too, when you set up the machine?

A. A certain amount of knowledge must be required.

Q. You don't get that by not thinking; you have to do a little study and have a little experience along that line, do you not?

A. We are only concerned with taking the deduction, which is one per cent of the earnings. That is all there is to it.

Q. What other reports do you make?

A. State unemployment insurance earnings record.

Q. You have to know something about unemployment insurance?

A. All we are concerned about is earnings of the quarter.

Q. You have to know what to take out?

A. There is no deduction for unemployment.

Q. What do you do with the earnings for unemployment?

A. Reports are made to the state.

Q. Who prepares those?

A. We do on the machine.

Q. Does the machine print a report?

A. Prints a report bearing the man's name and the earnings for the quarter.

Q. What else do you do with the report?

A. That is all. That report is given to the auditor, he checks it against his payrolls and sends it in.

Q. On sales analysis, what reports do you make?

A. Various reports, namely, by break down by product, showing sales and costs of various products as interpreted from the cards, and analysis for priority reports.

Q. Then you have to know a little something about the priority system to make out a report like that.

A. Only as far as the mechanical portion of bringing it out and printing the various codings.

Q. You have to know what the various symbols mean?

A. I have a book that lists them.

Q. How many priority symbols are there?

A. I don't know.

Q. There are a great many of them?

A. Only about fifty I imagine.

Q. Each symbol has a significance of its own?
A. That is right.

The Court: I am wondering how much time we ought to take for a record, if you want it in the record. I don't want to be too short with this examination but so far as I am concerned, I have seen these machines work, and I think I understand the situation. This man is an expert in that kind of mechanical bookkeeping and he understands these machines. The policies and what is required has to be transmitted to him or he has to study it out, then he has to see that the machines are set up to give forth the results wanted. The question in the case will be, now that we have had as much revealed by the testimony as we have, is the work which this man does merely a trade or supervisory? In order to be a supervisor, of necessity you have to have charge of the system. Or is there administrative work when you have charge of the machine? I am not deciding it. I don't know yet how to decide it, but that is the law. I think you have gone far enough. It will be awful nice, I just remark in passing, when the scientists will have reduced the law to that degree of certainty so that the judge can have one of these machines and you stick in the pleadings, the evidence, and arguments of counsel and out comes a decision of exact justice.

Q. One more than I would like to ask about. You do have supervision over how many people in the operating of the tabulating end of the payroll department?

The Court: He said he had two assistants.

A. As I explained before the girls that do the key punching, as far as authority is concerned, are mainly under Mr. Monroe.
Q. You have supervision over them.
A. To the extent of an hour or so a day, when I tell them to change the type of card they are doing and run a different type.
Q. How many of those girls?
A. Five girls.
Q. Two male assistants you have direct charge of?

A. Yes.

Q. In the absence of Mr. Monroe you take charge of the entire operation?

A. Yes, sir.

Q. How much is the base pay of your assistants?

A. I don't know.

Q. At any rate, you are presently getting $235 a month, isn't that true?

A. For a 40-hour work week.

Q. In addition you get straight time for overtime?

A. I get straight time. I really work 48 hours a week. We get the additional eight hours if I work; if I don't work the additional eight hours I get a straight salary. I was getting overtime up to the time—

Q. Just a minute there is no question.

Mr. Reynard: I think he should be permitted to explain his answer, if he has anything further to say.

The Court: Is there something bearing on the question?

The Witness: Yes, your Honor, I think there is. I was getting overtime up to the time for doing the same type of work I am doing at present. I got overtime for every hour over 48 hours. When I got the $200 salary I was told I would not get any overtime. I was naive enough to believe that was the law and let it ride. So it got to the point I wasn't getting enough I thought was commensurate with the job and I started proceedings to find out what the overtime was in regard to the overtime question.

Q. You say you were naive enough to believe that was the law.

A. That is right. I didn't even know anything about the Wage and Hours Division at that time.

Q. So you started an independent investigation by writing to a government agent to find out?

A. Yes.

Q. It is true, isn't it, the duties you now have are different than the ones when you were getting overtime?

A. No, sir, not up until last month. The last month by reason of the fact the young man who has been my chief assistant in the tabulating department has been expecting

a call for service, and if he goes in service his training I have given him will be of benefit, so I have more or less let him take absolute charge of all jobs of wiring, and he consults with me when he wants to.

Q. So, currently, you are not doing any of the manual work?

A. I still go out and help out if they get in a jam.

Q. So you have now reached full bloom as a supervisor except for an hour or two when they get in a jam?

A. Most of my time is spent with Mr. Monroe going over procedure, or assisting in his correspondence.

Q. So you presently are not doing the same thing you were doing when you were getting overtime?

A. No, I haven't been up to the last month.

Mr. Dill: That is all.

Mr. Reynard: We have asked the defendant to produce the records covering the employment of those four individuals, which we would like to examine and introduce, and with that I think the plaintiff will rest its case.

The Court: Are the records available?

The defense has witnesses to be examined?

Mr. Smith: Yes, your Honor, there will be two or three.

The Court: Can we not proceed with the understanding there will be the introduction of those records after they have been examined?

Mr. Reynard: We would like to have the opportunity of examining them in order to prepare to cross examine the defendant's witnesses.

The Court: Well, we at least could proceed with the direct examination of one witness and we will take a recess, and the record will show the case rested here with the introduction of such records as you offer later.

Mr. Smith: I wish to be the first witness.

DEFENDANT'S TESTIMONY.

GLEN O. SMITH,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Dill:

Q. Will you state your name, please?

A. Glen Smith.

Q. You are an attorney at law?

A. I am.

Q. With offices at 1950 Union Commerce Building, and you are attorney of record in this case?

A. Yes, sir.

Q. You have been counsel for the General Industries Company for a long period of time?

A. Yes.

Q. Will you just relate to the court what connection you had, if any, with the problems of the General Industries Company involving three engineer foremen by the name of Page, Spooner and Stegman, beginning whenever you were called into the matter?

A. Well, historically, my connection with the powerhouse employees goes back to the latter part of 1939, when the firemen and oilers' union presented a demand to the company for a contract for all the employees in the powerhouse, and Mr. Seitz was the business agent or representative of the union, I think he was the international vice-president of the firemen and oilers' union.

In order, perhaps, to understand the problems relative to powerhouse employees it should be known that at that time and since that time this company had four unions, different unions, representing its production workers. The unions themselves had many problems among themselves, many disagreements, which caused a very difficult problem to keep production going.

Well, when Mr. Seitz and I got together in connection with his demand for a contract for all of the powerhouse employes, the first and most difficult problem when we met was the question of these engineers. Mr. Seitz and his

union insisted they were not supervisory employees or foremen and that therefore they belonged to the union. The company took the position these engineers were supervisors, had always been supervisors, and were the only supervision they had in their powerhouse, and that accordingly, under the law, they could not belong to the union.

Well, that caused a lot of serious trouble. It was difficult to resolve the union's point of view and the company's point of view, but, under threat of strike, stopping of the powerhouse which would stop all of the plant—which had happened sometime previous to this—the company finally made this kind of a concession on this question: that if the engineers wanted to belong to the union the company would shut its eyes to that fact and waive that question, with this proviso which was written into the contract. The contract, in general, under the representation clause, said that the union would represent all of the employees in the powerhouse except supervisors, and then there was a clause put in which indicated that the question as to whether or not a man was a supervisor would be determined finally as between the parties by the National Labor Relations Board.

That contract was executed, as I remember, in September of 1940. It was a contract for a year.

Mr. Dittoe: If the Court please, I would like to know the purpose of this line of testimony. It is, of course, interesting from a historical point of view but I am unable to see where it adds to the defense case.

The Court: What do you have more in mind, Mr. Dill?

Mr. Dill: The purpose of this line of testimony is to support the contention of the company that an agreement was made with the bargaining agents of these individuals in which the question of overtime was included in the salary agreed to and paid to these men subsequent to February, 1941, under the theory in the Belo case.

(Further argument.)

The Court: We can omit a great deal of background and come as directly as possible to what is pertinent in this case.

The Witness: Well, we executed this first contract in September, 1940 for a year.

Four or five months later Mr. Seitz came to me complaining bitterly about the fact not all the engineers were joining his union, and it was causing a great deal of friction in the powerplant; that the firemen refused to take orders from the engineers unless they did belong to the union, and unless that thing was resolved and straightened out they were going to pull the fires. That, plus the fact of overtime. He raised the question with me again, insisting that due to the fact the engineers were on an hourly rate of pay, that they weren't supervisors.

Well, that opened the door to a possible way of restoring peace in the powerhouse. We sat down and negotiated a new contract, sometime the early part of 1941, although the other contract had not yet expired, and in that contract we put the same language in with reference to the question as to whether they were or were not supervisors, but we negotiated a salary rate for the engineers. We took the engineers off of the hourly rate.

Mr. Reynard: May I enter an objection? If there is a salary arrangement in the contract we should have the contract.

(Further argument:)

The Witness: Well, for the benefit of the record I am perfectly willing. I have before me all four of the contracts we have executed with this union, they are copies. I am perfectly willing to offer them into the record and to counsel for the Government.

The Court: Let counsel examine them. Proceed.

A. (Continued) As a result of that, we executed a new contract dated March, 1941, and the basis of this new contract was that we put all of the engineers on a salary basis, and we also reduced the number of hours that the engineers had been working. If I remember they had been working an average of about 56½ or 57 hours per week. We negotiated a cut in those hours, I think down to 51 or 51½ hours per week, and agreed on a salary per month of $185, which salary was to include all over-

time, and the pay for the regular scheduled work week which was 51 or 51½ hours.

Now, that rate of pay, as I remember it, was definitely negotiated with Mr. Seitz, the business agent of the union, with myself, and following that negotiation and agreement, the shop committee from the powerhouse and Mr. Marsh came up to Cleveland and met with Mr. Seitz and me, at which time we signed this agreement. That was done in my office.

It might be interesting here to note that all through these negotiations and all our dealings with this union, although the union insisted the engineers could belong to the union, at no time did we ever have an engineer on the shop committee. No engineers were ever on that shop committee, and as a result it created a difficult problem in the powerhouse.

Now, following this negotiation in March of '41, we have had many negotiations with Mr. Seitz, representing the union, and the shop committee, and up until this past summer this question of whether or not the engineer was a supervisor or not was always present. The union never took the problem definitely to the National Labor Relations Board for a decision. It was a current problem all that time until this past summer when the union signed our last contract. They waive the right to represent the engineers, and we drew a contract which represents, or which is representative for all of the employees in the powerhouse except the engineers. So that under the present contract the union does not represent the engineers, although I still understand either one or two of them still belong to the union.

Mr. Dittoe: I have a continuing objection to this line of testimony.

The Court: Well, it is difficult to rule. At this time the court will overrule the objection temporarily. It is, at least, history as to how these rates and wages were arrived at.

(Further argument.)

Q. Mr. Smith, at the time you negotiated the contract with the union and changed the basis of pay for these

engineers from an hourly rate to a salary, did you base that on their regular rate of pay per hour at that time?

A. As I remember, yes.

Q. And then did you compute the amount of overtime they were then working?

A. That is right.

Q. And did you multiply their regular rate of pay by one and a half to represent the scheduled overtime hours over 40 hours they were working?

A. Yes. It is, just unthinkable to think you could negotiate with a union on a rate of pay that didn't take into consideration overtime.

Q. Then the following question is this: Did the amount of salary per month include the scheduled overtime worked by these men on the three-shift basis at one and a half times their regular rate of pay per hour?

A. That is right, that is the way Mr. Seitz and I approached this question.

The Court: But that would have to be an estimate, it couldn't be exact?

The Witness: It couldn't be an exact figure.

The Court: Sometimes it might be over-payment, sometimes it would be under-payment.

The Witness: Yes, Judge. There were a number of factors that enter into that. These men, all of them, wanted to be on salary rate because it took them into another class where they got so many other benefits they hadn't had. For example, if they were on salary if they were home sick for one day, one week or six months, they got their pay, their pay continues; while if they were working on hourly rate if they were absent just half an hour they didn't get paid for that. So there were many factors that entered into this, and the union and I sat down and negotiated this salary, which was acceptable to the union and the employees and contemplated regular time pay and regular overtime for the work which was agreed on at that time.

The Court: I think I understand what the final question is.

Mr. Dill: That is all.

The Witness: May I just make a further statement?

The Court: Proceed.

The Witness: I would like to make a statement in reference to my appearance at the Wage and Hour office. It has been testified yesterday by Mr. Morgan, as I understood him, that when this matter came up the company consulted me about it. That is true. And I got in touch with Mr. Morgan over at the Wage and Hour Division, made the appointment, went over to see him, and I spent an hour or so talking with him, and then finally went to a man whom he said was his superior, and after that time Mr. Morgan and his superior and I went over and talked to Mr. Duemler. The purpose of my visit there was to object to the finding of Mr. Morgan in reference to the engineers only. I knew nothing about Mr. Payne's case at that time.

I explained, as best I could, over a period of two or three hours, to these gentlemen that this company felt definitely that the three engineers were exempt employees. I explained as best I could that I thought they had somewhat of the professional qualifications for exempt employees under the Act, some of the administrative and some of the executive, and I thought it was unfair under all the circumstances to rule that they were non-exempt. And then I went into great detail explaining the problem that we had with the union in reference to these employees, and that we had negotiated the rate of pay that these men got with the union, and we just generally explored. But the net result of that meeting was, as I got it, that they were not interested in the union angle or how the pay was established, or if it was negotiated with the union. They weren't interested whether all overtime or no overtime; they took the position that these men had a base salary and they worked more than forty hours and they had to get time and a half for every hour they worked over, whether the base salary included overtime or not.

They then arranged another meeting, due to the fact I was not familiar with the case of Mr. Payne.

We arranged another meeting in which Mr. Marsh, Mr.

Russert and I came up and talked to them again about the engineers' problem and also Mr. Payne's case.

Mr. Dill: I have no further questions.

CROSS EXAMINATION

By Mr. Reynard:

Q. Mr. Smith, I would like to get a little more detailed picture of the terms of the contract under which these men were taken off the hourly rate, these engineers, and placed on a monthly salary. Just what were the provisions of that arrangement or how was the salary arrived at?

A. Well, it was arrived at through negotiation with Mr. Seitz and myself here in Cleveland.

The Court: What were the calculations? What was the basis? What did you begin with?

The Witness: As I remember it the rate of pay at that time was about eighty cents an hour—that may be 75—it was approximately 80 cents an hour that those engineers were getting at that time, and I got my figures from Mr. Marsh or somebody from the General Industries Company, and Mr. Seitz got his direct from the engineers. Now, in our calculations at that time you have got to take into consideration the engineers at that particular time were working at the scheduled week, so we reduced the number of hours which the engineers wanted to work and arrived at a salary that included all pay for the number of hours which the work week was at that time.

Q. Was anything additional added to that amount?

A. Have you ever negotiated with a business agent representing employees?

The Court: Well, he wants to know how your base present pay was arrived at; by what calculation did you arrive at the figures which you ultimately reached?

The Witness: Well, you had a regular formula, then as now, you had to pay time and a half for over forty hours, every workman got it.

The Court: You say that time and a half for overtime was figured into the salary. Counsel wish to know how you did it; what the figuring was.

The Witness: I don't think there was any exact formula. I won't say we took every man's pay by the hour and multiplied it, for example, fifty hours, if he was getting 80 cents, that would be $40 times 4, $160. You can see how approximately you work these things out; there wasn't any exact science.

The Court: The formula wasn't reduced to writing?

The Witness: No, in these negotiations you don't do that. You arrive at a happy meeting ground.

Q. Now, was the salary to be compensation for just the scheduled shift that the man would work, or was that to be the full compensation for whatever number of hours he worked during the week?

A. I don't want to be too exact about this but as I remember in these negotiations we reduced the work week that these fellows were to work to 51 or 51½ hours,—it may be 50 or 51—and from that we negotiated on to a fixed salary. Because the union was demanding all these men were supervisors, they had to be on a salary, and we were trying to meet the salary.

By the Court:

Q. After you figured it on the base figure for the actual time they were serving and fixed it as a salary for the purpose of fixing it at a salary was something added for overtime or something deducted for these other benefits?

A. Yes. There was something added, too, if your Honor please.

Q. How was that arranged; what was it?

A. In those negotiations—I am working on my memory at the moment—those fellows were getting 80 cents an hour, round figures 50 hours a week, which would give them $40 a week, approximately $40 for four weeks, $160. You can see when we arrived at a salary of $185 a month, you can see the give and take; it would take care of something, the overtime for the extra hours.

I want to be very sure about this with counsel and the Court, I am not trying to leave the impression that that salary was figured exactly mathematically time and a half;

it was a question of negotiation, with a lot of other things that were put in.

By Mr. Reynard:

Q. That is what I was coming to. In other words, after you had once arrived at this salary in lump sum of $185 a month, you didn't provide a fixed hourly rate would be used in determining any overtime compensation beyond those scheduled number of hours per week?

A. No, I think at that particular time the company was going on the premise, which we are still going on, that these men were what you call exempt employees, they were supervisory employees, and that under the law they were not entitled to time and a half, and under the present salary stabilization regulations they are not entitled to time and a half. We are only authorized now to pay them straight time over those hours, which they get.

The Court: I thought I had brought out that point. I understand it is not the company's contention that if these salaries are transposed to wages and figured upon a basis of base pay plus time and a half for over time it would work out exactly. This was a figure reached in the course of bargaining.

The Witness: Mr. Reynard, that $185, from the company's point of view and the union's point of view, was the full pay for an engineer for the then established work week, which I say was 51½ hours, and that $185 included his base pay, his overtime pay, and all the other things that he hadn't received before, which was insurance and a pension plan, and pay when he was absent or sick. And incidentally, I think it was at that time that the union demanded, and we agreed with the union demand, that these engineers in working out their work week could determine their own hours, their own shifts; that supervision or management of the company would have nothing to do with it, they could work these hours whenever they wanted to as long as they kept an engineer on the place.

Q. And the $185 was compensation for the job regardless of the number of hours they worked; that is, if at

their mutual convenience one man worked long hours one week and fewer the next, that $185 was his whole compensation?

A. That is right, and the union had full control over that. For example, many times an engineer wanted to go fishing. He didn't talk to us about that, he just got another engineer to do his trick. We had no control over that. So that one week an engineer might work many more hours than he was scheduled to work, and that would be because he was taking somebody else's trick voluntarily.

Q. You didn't contemplate at the time these men could be considered as administrative employees, the engineers?

A. Well, yes, I contemplated they might be classified as administrative. I also thought they had a lot of the qualifications of the executive and also of the professional. They had a little of each.

Q. Well, you know, don't you, that the regulations for both administrative as well as professional required a minimum compensation of $200 a month by way of salary?

A. Well, I think that is true. I don't think that was in effect back there at the time we did that.

Q. The regulations themselves which have been offered as Plaintiff's Exhibit 2 show these regulations were adopted in 1940, became effective on October 24, 1940.

Mr. Dill: You didn't say that was a requirement for administrative exemption?

Mr. Reynard: Yes, indeed, $200.

Mr. Dill: Did you say for the executive exemption?

Mr. Reynard: Not for the executive exemption.

Mr. Dill: What is it for the executive?

Mr. Reynard: $30 a week minimum.

A. Well, I do not know whether at that particular time we took the position, to answer your question, clearly without any equivocation. We took the position at that particular time these engineers were clearly supervisors and exempt employees as supervisors. I think you will find the record when you get the payroll, I think you will find we established a salary of $185 effective February

1, 1941, and I think then sometime in the summer of '41, maybe the fall, that was raised to $195 a month, and that was also with negotiation with the union, and that at the present time that salary is $205 or $215 a month, something like that.

Q. $210.

A. $210.

Mr. Reynard: That is all.

RE-DIRECT EXAMINATION

By Mr. Dill:

Q. 80 cents an hour for 51 hours, mathematically computed, comes to $45.20, if you include 11 hours of over time, if you multiply by 52 and divide by twelve, it comes to $195 a month. If they work 51 hours a week and are paid a regular rate of 80 cents, and also are paid overtime for the 11 hours of over time. Is there any significance on February 1, 1941 there was an agreement to pay $185 a month and then within six months, on August 1, 1941, it was raised to $195, which is the figure you get by using the regular rate of 80 cents a scheduled work week of 51 hours?

A. Well, I wouldn't want to say positively. Of course, the reason we made it $195 in August is because you add and subtract and multiply and get $195. The reason we made it $195 in August was because the union demanded it and got it.

Q. By the raise that took place in the following year, August, 1941, they went to $195. Then in January or February, 1942, they went to $210. Now, do you recall the reason for that; was that just more negotiation?

A. It was more negotiation with the union. As I remember, the raise in 1942 came primarily as a result of a general wage increase for all of our supervisors. I think the wage increase in 1942 was a result of an increase that we gave which was authorized by the Salary Stabilization for all of our supervisors, due to the fact these men, from the company's point of view were supervisors, they got that additional $15.

Q. That was a $15 increase given to all foremen?

A. Yes, but under these circumstances I had to negotiate with Mr. Seitz because Mr. Seitz contended he represented the engineers.

Mr. Dill: That is all.

(Short recess taken.)

Mr. Reynard: We have been able to reach a stipulation which will make it unnecessary for Mr. Smith to testify further. The stipulation is in connection with the introduction of the plaintiff's exhibits, consisting of the payroll records covering the four employees involved in the case.

These records cover the period, roughly, from 1941 to date, for the four employees involved, and although no hours are shown on these records the defendant does have a separate record showing the hours worked each week by the employees. The record does show the earnings, and prior to June 1943, the salary paid is entered under the column "Regular pay". There is no indication of any overtime being paid. After June 1943 additional payment is indicated in the column marked "Overtime paid", and that amount, by stipulation, represents the additional overtime at straight time for the hours worked beyond 48 per week in the case of engineers. In the case of Mr. Payne for hours over 40 to 48. That is set forth on Plaintiff's Exhibit 1, which sets up the schedule pursuant to which the employees are paid overtime, if any. In connection with the second record which I mention in reference to hours worked, that runs only from 1943. Prior to that time no record of hours worked was maintained by the defendant.

The Court: Is that record offered in evidence?

Mr. Reynard: I don't propose to offer it unless defendant does. I do want to offer Plaintiff's Exhibit 3, consisting of four sheets, comprising the payroll records for the four employees involved in the case.

The Court: Very well.

Let me at this time inquire,—I understand the purpose of evidence defendant has offered and probably ex-

pects to offer is to the general effect that the result of what they have done is an approximation of the requirements of the law.

Mr. Smith: That is right.

The Court: I understand counsel for the plaintiff will contend that is not sufficient.

Mr. Reynard: That is right.

The Court: Then is not the issue as I understood it from my first contact with this case,—simply one question of law? Do these men fall within the exempt class or do they fall within the other class, non-exempt class? We know what their general duties were, now isn't it all a question of law?

Mr. Reynard: I think it is.

The Court: This court will have to determine. If they are within the non-exempt class, then the rules and regulations and the orders of the Wage and Hours Division must be obeyed and the showing of good intent or pressure of the union or anything else, however sympathetic the administrators or this court might be with the defendant's position, it would not modify the requirements of the law, if the law is to be interpreted as the plaintiff contends.

If they are not within that classification then all that the administrator says is of no avail, they are exempt and the company will take care of them as it has taken care of them.

Is there any other issue now in this case?

Mr. Smith: Except the Supreme Court has held in the Belo case, where a rate of pay is negotiated with a union and it includes payment for overtime—that is a defense.

Mr. Reynard: I think, though, that is the legal issue. I think it is entirely a matter of law which could be argued or briefed in a short memorandum.

(Further argument had.)

Thereupon the defendant called as a witness

O. W. MARSH,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. State your name.

A. O. W. Marsh.

Q. Where do you live?

A. Elyria, Ohio.

Q. What is your business?

A. Vice-President and factory manager of General Industries Company, Elyria, Ohio.

Q. How long have you been associated with this particular company?

A. 28 years.

Q. And as works manager have you had the duty of supervising or being involved in negotiations with unions representing the employees of the company?

A. I have handled the labor relations for the last four and a half years for both of our divisions.

Q. Now, limiting your testimony, making it as brief as you can, did the firemen and oilers union make any demands on your company?

A. As I recall it, back in 1938 we had a work stoppage in our power plant due to some misunderstanding. That was prior to when I took over the labor work. Then in 1939, the fall perhaps of '39 or the beginning of '40, we signed our first contract with the firemen and oilers union.

Q. Now, in the negotiations with the union involving employees in the power house, what was the major difference?

A. The biggest difference between the union and the company,—well, it is a little difficult to state that. I have no quarrel with the union but prior to 1938 or '39 there was no question of who was foreman in the power house on any shift, first, second and third.

Q. Who was it?

A. It was the engineer. Since that time the manage-

ment has had a very difficult time defining and maintaining their function. Little by little the unions have tried to take away some of those functions, and, as has been brought out here, this union—and I might state that there has never been an engineer on one of these committees pertaining to this union, yet they would insist that they bargained for them. As our contract of 1940 very clearly states, it was an issue, and it is so written there, it was such a problem at that time that we feel there is no one but the National Labor Relations Board could decide it.

Mr. Dittoe: I would like to renew our motion to this line of testimony going to the difficulties the company has had with the union.

(Further argument.)

Q. All right, proceed directly to the second contract which was in the spring of '41. Did you have anything to do with those negotiations?

A. Only in the final negotiations with the committee, Seitz, and yourself.

Q. Now, you just state who was present at that meeting and whether or not the contract was signed there with the representatives of the union?

A. Well, the committee, three committee members, I believe they were, and Seitz, yourself and myself.

Q. Did you have anything to do or did you hear any discussion or talk about setting a salary for the engineers at that time?

A. Yes, it was about the same testimony you gave here, substantially correct if I recall to my memory, due to having four contracts each year and since that time sixteen contracts, I believe that is correct.

The Court: Relate how that amount was arrived at.

The Witness: At that time they were on an hourly basis. As I recall it was somewhere around 80 cents. And with Seitz and with the committee we figured out about how many hours they were working. I believe at that time they were working 56 or something, and they asked their hours be reduced, which we agreed to. Then we come up with a 51 hour work week and we arrived at this

$185, figuring 40 hours, that is all you need figure, that is the base, the $185 would take care of the overtime up to the 51. And I want to bring out, too, that the union recognized the security of having a pay check every month. In my connection with this company in all those years, I can never recall when a man was sick we ever stopped his wages if he was on salary. I can think of some cases where they have been gone a year and a half. Of course, the union recognized that because that is what all men work for, security; and that, too, was talked about. They asked, if a man wanted to take a day off, if the other engineer or fireman could work in his place provided they made it up to one another later? We said, "Surely, if you want to work that out, it is all right with us. If you want to work 60 or 70 hours and the other fellow work 30 you are still going to get your pay."

Q. As a result of that talk the union did agree to the salary agreed upon and signed a contract based on that?

A. Yes, we have a signed contract.

Q. And that salary was put into effect retroactively to February 1, 1941, was it not?

A. Yes, sir.

Q. Now, sometime later, a matter of months, the union again approached you for more money, did they not?

A. Yes.

Q. About how long later was that, or how long after March, 1941?

A. It seemed like it was in August; I am not exactly clear on that.

Q. We had some more negotiations with the union with reference to the engineers at that time?

A. Yes.

Q. As a result of that negotiation what rate was established for the engineers' monthly pay?

A. $195.

Q. During those negotiations was the question of overtime discussed, as you recall?

A. You mean this second negotiation?

Q. Yes.

A. That I am not sure about.

Q. Anyhow, the result of the negotiations was a ten dollar increase?

A. I can say this, the union was satisfied, and if it wasn't right they would not have signed the contract.

Q. As works manager down there you are familiar with the power plant of the General Industries Company?

A. Yes, sir.

Q. Would you just briefly describe the functions of it and the equipment, and so forth?

A. Well, we are one of the few concerns in this area that manufacture their own electric power as well as high pressure steam. We are in the plastic business, and as well as steam we use a tremendous amount of air. We have four boilers, just about go into this room, and we have four engines that generate this DC power which we use. Through all these years that I have been there we have always felt that this power plant was one of the most important departments we had in our plant, not only from the angle of investment but the lives at stake if anything should happen in this plant. We might not only blow ourselves to pieces but perhaps a quarter of Elyria. It is not just simple machinery. These engines run probably $40,000 a piece. Of course, they have a very heavy base. It is a lot different than the ordinary factory that buy their power and have a stationary engineer that works with low pressure steam for heating and plating and simple work. We are one of the few in this area that manufacture our own power.

Q. Would you just say something in connection with the importance of steam in your molding of plastics and pressures necessary?

A. Well, 150 pounds pressure, of course, is generally away above that used in any manufacturing business, but in this plastic industry we require that high pr sure in order to get the heat units that is necessary to transform this plastic material into final shape.

Mr. Ditto: If it will save any time, we could stipulate the employees have an important mechanical job, and we have no intention of belittling their type of work.

The Court: It is in now and is not disputed so you need spend no more time or call another witness.

The Witness: Might I just say this, your Honor? Sometimes in the past I can recall where perhaps one of these workmen would come in, and let's say slightly under the influence of liquor. We hold these engineers responsible to either send that man home or at least get in touch with somebody, even if we have to go to the president, because they are in a very dangerous position, not only for damage to property but loss of lives.

Q. One more question: from the management's point of view, who is the supervisor or foreman in charge of the power plant and all employees in it on each shift?

A. Here is the order of organization: Mr. Schmittgen, the factory manager of that division, has charge of this power plant. The chief engineer, a man by the name of Latteman, reports to him, and in his absence a man by the name of Stegman is in charge. Then on each shift we have the engineers who report to Stegman, if Latteman isn't there, or if he is. Stegman is somewhat in the category of an assistant to Latteman, and Latteman in turn to Schmittgen.

Q. On the second and third shift who is in charge of the property from the management point of view?

A. There is no question the engineer always has been. We look to the engineer. Now, that is easy to understand. Who is the foreman of the assistant fireman, if we don't have a foreman or the coal passers? There is no place runs without a foreman; somebody has to be in charge. Now, surely this place doesn't run without supervision.

Mr. Smith: At this particular time, before I forget, I would like to introduce these four contracts, copies of each and all of the contracts we have had with the firemen and oilers' union, beginning March, 1940 on through '44.

The Court: They may be marked and will be received.

Q. You did go up with me to see Mr. Morgan at the Wage and Hours?

A. Yes, sir.

Q. Will you just briefly outline the talk that we had

up there in reference to the engineers and Mr. Payne?

Mr. Ditto: Could I interrupt to record our objection to these contracts, on the ground we consider them immaterial?

The Court: You asked for them and were allowed to see them.

(Argument had).

The court will reserve their reception.

A. Well, we would have to go over this ground again about this union stuff.

The Court: You need not do that.

Q. Mr. Marsh, yesterday Mr. Morgan testified, as I understand in substance, that at the time we ware up there we did not discuss with him and his chief the question of the negotiation of this salary with the union and that it did include overtime. Now, you just state whether or not that was discussed up there.

A. I am confident that we covered that ground, the picture of this whole thing, very carefully, with not only them at that time but I spent hours with Mr. Morgan when he first came to our plant and explained that angle to him.

The Court: What do you mean by "that angle"?

The Witness: This union picture, this arriving at a wage, putting them on a salary, and the whole procedure.

The Court: And that in fixing the salary you did make an estimate and allowance for overtime?

The Witness: Well, sick leave and everything. And I pointed out to Mr. Morgan at that time that I was so afraid, if I can use that word, we would end up in a union difficulty here and fight, by having this agency now finding what they are.

Q. Just one more question in reference to the engineers. What part of their time, from your observation, would you say they perform mannal work?

A. Well, of course, through 25 years of occasionally dropping into the power house, I don't believe it would be very conclusive. I know they turn on the power; they

shut off the power; they inspect the boilers to see they are operating right, and they listen. They may be wiping an engine and their trained ear will tell them if something is wrong, if a bearing needs tightening, or something to that effect. That is their job. Many times they sit out there in a rocking chair just listening: I wouldn't hear it but they could.

Mr. Smith: That is all.

CROSS-EXAMINATION

By Mr. Reynard:

Q. Coming back to this negotiation at the time the engineers were taken off the hourly rate and placed on salary, you have somewhat described the mechanics of that. Was that agreement, the mechanical calculation, reduced to writing?

A. Not as far as I know.

Q. And was any specific hourly rate agreed upon as being the basis on which the monthly salary was computed?

A. Well, it was arrived at—

Q. Was the salary made up of the rate they were getting at that time?

A. It was based on that rate, based on that specific rate. As Mr. Smith testified, Mr. Seitz and himself did the preliminary negotiations and arrived at this figure, and of course the committee and the company agreed.

Q. Now, was there any agreement at that time about paying additional overtime in the event they worked beyond this 51-hour schedule?

A. We did not contemplate any additional time except if one man took off a couple of hours the other would work in his place, or something to that effect, they were going to trade back and forth so that at the end of the year they would be even again.

Q. Do you know of your own knowledge whether they worked more than 51 hours during any week?

A. No, I don't.

Q. That is not your department?

A. No.
Q. That is under Mr. Schmittgen?
A. Yes.

Mr. Reynard: That is all.

RE-DIRECT EXAMINATION

By Mr. Smith:

Q. I want to ask one question more. In reference to Mr. Payne's case, when you were up to the Wage and Hours, that case also was discussed very thoroughly?
A. Yes.
Q. At that particular time we showed them the letter which Mr. Russert had written to Wage and Hours for an interpretation of his case?
A. Yes.

Mr. Smith: That is all.

CARL F. RUSSERT,

called as a witness by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Dill:

Q. State your name, please.
A. Carl F. Russert.
Q. You live in Elyria?
A. I do.
Q. How long have you worked for the General Industries Company?
A. Eighteen years.
Q. What is your present title?
A. Treasurer and assistant secretary.
Q. How long have you been treasurer?
A. Since 1942.
Q. Now, as treasurer and assistant secretary do you have charge of the payroll department and cost tabulation department?
A. I do.

Q. Who is the paymaster?

A. L. J. Monroe.

Q. Who is assistant paymaster?

A. Clarence W. Payne.

Q. And what are his duties?

A. His duties are to see and be in full charge of the tabulating department, to assist the paymaster in getting the payrolls out, to assist the paymaster in the distribution of shop expense, and to act in the capacity of paymaster when the paymaster isn't there.

Q. Now, is that job a job which calls for any more capacity and ability than simply routine clerical work?

A. I would say definitely, yes.

Q. Why?

A. In the first place, in our previous contact and when we made our installation of the I. B. M. equipment, we discussed the problem with the International Business Machine people. At that time when it was installed we started in a small way, which was explained yesterday, reporting on the hourly wages, and so on, but he explained to us as we gained our experience and knowledge of the machine, and the person that was working on the machine or supervisor would acquire the knowledge, we could expand and cover all our accounting records.

Q. Well, does the man who has the duty of covering the accounting records have to be an accountant?

A. It is very much recommended that he does, but he has to develop himself; and for that reason, in the years gone by, I have asked Mr. Payne, it would be to his benefit and the company's benefit if he educated himself in account matters, which I am under the impression which he told me he did.

Q. What do you mean by accounting? Do you mean routine bookkeeping or analysis of accounts?

A. Bookkeeping, analysis of accounts, and the higher mathematics of accounting.

Q. Does the job of preparing reports for the executives require any independent discretion and judgment, or is it purely routine?

Mr. Reynard: I think that calls for a conclusion.

The Court: I suppose it is one of those questions on the border line: he may answer.

A. Yes.

Q. It calls for independent judgment and analysis?

A. It would.

Q. Will you explain briefly, now, just why that is so in this case?

A. Well, in the first place, I know nothing of I. B. M. equipment; the paymaster knows practically nothing, he couldn't operate that machine without having someone there as an assistant to see that work is done. Now, it is very complicated, and the I. B. M. people tell me it takes about 3½ years to be an expert on the job.

Mr. Ditto: I object to the hearsay testimony; I don't think he is qualified to pass on the work.

The Court: I don't think we need it for the reason I said earlier. This court and I think any reviewing court would understand what this bookkeeping machinery is.

Mr. Smith: I might say we have a witness coming from the International Business Machine Corporation who will corroborate the testimony as to the use of this machine.

(Further remarks.)

Q. Now, passing the question of his duties, because it is agreed here it is a job requiring a skilled person in the operation of these machines, coming this question,—up until January 1, 1942, he was paid overtime?

A. That is correct.

Q. He was considered non-exempt from the standpoint of the Fair Labor Standards Act?

A. That is right.

Q. At that time you increased his salary to $200 a month, is that correct?

A. That is right:

Q. How long had he been operating these machines?

A. Prior to '37; I don't know the exact date.

Q. It would be in the neighborhood of five years?

A. Yes.

Q. Why did you then consider him an exempt employee?

A. In the first place we were trying to adhere to the rules and regulations of the Wage and Hours Division and he had all the qualifications except receiving the amount of money, $200 a month. When he would receive that $200 he would fulfill all the requirements of the law.

Q. In your opinion?

A. That is right.

Q. Now, subsequently to that there was some question raised by Mr. Payne as to whether or not you were correct in considering him an exempt employee; is that right?

A. That is right.

Q. Did you write a letter to the Wage and Hours Administrator about the question?

A. Yes.

Q. How did that come about, why did you write to them?

A. Mr. Payne came in and discussed his problem. Said he didn't feel we were treating him according to the wage and hours provisions. I told him our interpretations were we were. He asked me if I had any objections to his going to the Wage and Hours to find out what the low-down of it was. I consented. I said, "However, to clarify our determination, I will write a letter explaining our problem, give them all the facts in the case to the best of our knowledge as his superior." That is when I wrote the letter.

Q. I will hand you letter marked Defendant's Exhibit K, and ask you if that is a copy of the letter you wrote to Mr. Reynard, Attorney for the Wage and Hour Administrator?

A. This is the letter Mr. Case wrote under my instruction, yes.

(Letter read to Court.)

Q. I will hand you what has been marked Defendant's Exhibit L, and ask you if that is the reply which the company received from Mr. Reynard, attorney in this case?

A. It is.

(Letter read to Court.)

Mr. Smith: I offer these two in evidence.

(Objection; argument.)

The Court: Well, why waste time? They have been read into the record, and we might as well get along. I will receive them.

Q. Pursuant to your duties as treasurer, did you make application to the Salary Stabilization Unit of the Treasury for approval of increase in salary for Mr. Payne?

A. I did.

Q. And that increase was by specific approval of the Salary Stabilization Unit: that is, he was then getting $200 and he is now getting $235?

A. I believe it was; I am not positive. He was either getting $215 or—I think he was getting $215 at that time.

Q. And you obtained approval to raise him to $235?

A. I did.

The Court: Is that the limit in the approval?

The Witness: It is not.

Q. Will you explain to the court what the straight time overtime is we have heard so much about, for supervisory employees?

A. We went to the Treasury Department and tried to get approval for all our supervisory employees, including the foremen in the shop and all supervisors in the office. They limited it to straight time overtime for time worked in excess of their customary time. In other words, in the factory our customary work week is 44 hours a week. They permitted us to pay foremen up to 52 hours per week on the straight time basis. In the office our customary work week is 40 hours, and they permitted us to pay straight time at the regular hourly rate basis on 40 hours, up to 48. But there was a stipulation if they did not work those eight hours over time they weren't to be paid.

Q. Why did you seek to get an increase for the supervisory help?

A. Because they were putting in additional overtime.

Q. Was there any relation between the pay of the

exempt employees and the take home pay of the nonexempt employees?

A. There certainly was. The nonexempt people got time and a half and their pay was so close to the supervisors in some instances they were making more money than the supervisors. It was for good employee relations, as well as there should be a spread between the two that we felt they were entitled to. That is why we wanted to get them more than was granted them.

Q. Would the Treasury give you any increase in their basic salary?

A. They did in isolated cases, but as a broad general thing they didn't. The one where they made an exception was in a case like Mr. Payne's.

Q. In Mr. Payne's case they said they would allow you to make an increase in his basic salary in addition to getting straight time overtime?

A. That is right.

Q. So that was a method the Salary Stabilization gave you to permit you to increase the take-home pay of these exempt employees?

A. That is right.

The Court: I understand from this witness it is not your claim that fixed the maximum which you can pay. You are not offering this evidence to prove by some administrative order you are paying all you can pay?

Mr. Smith: In Mr. Payne's case we say no, we have authorization for a higher salary.

The Court: That is the basic salary.

Mr. Smith: We can go higher on the basic salary, but we are limited on the straight time overtime. We cannot possibly pay any more than we are paying on that basis without getting further approval.

The Court: He doesn't get overtime.

The Witness: He gets straight time overtime.

The Court: Not time and a half.

It has no relation to the Wage and Hour law; it is simply a stratagem used by the Salary Stabilization to give an increase without allowing an increase in basic pay.

Q. By the way, did Mr. Payne take advantage of the unlimited sick leave given to supervisory employees in 1944?

Mr. Reynard: I think that is entirely immaterial.

The Court: Yes, I think so. Objection sustained.

Q. Now, there is a claim in the petition that the company is in violation because they failed to keep adequate records. What is the fact as to the records kept by the company insofar as requirements of the administrator are concerned?

A. We keep the records of the hours worked and the earnings.

The Court: Did you offer any evidence on the point of what the regulations required?

Mr. Reynard: Beyond indicating at the time we introduced the payroll records no hourly records have been maintained for the engineers prior to June '43, no, we offered none.

The Court: Are you insisting on that part of the complaint?

Mr. Reynard: They are keeping record of the hours worked now. Beyond that I am not certain what other records there are. That was the basis of our complaint here.

(Noon recess, and at 2 p. m., same day, trial resumed.)

CROSS EXAMINATION

By Mr. Reynard:

Q. Mr. Russert, I will hand you two documents, the first marked Plaintiff's Exhibit 4, and ask you to tell us what that is.

A. That is a time sheet for Paige.

Q. For what work week does it cover?

A. It covers work weeks November 26 to December 30.

Q. How many weeks are in that period?

A. Five.

Q. And how many hours did he work during the various weeks?

A. First week 59½; second 59½; third 59½; fourth 59½; and the fifth 28½.

Q. You will notice after the total weekly hours in the column at the extreme right of the exhibit there is a small number "7" after the first four weeks. Do you know what that number means or what it is on there for?

A. I don't know, I didn't make that up.

Q. Do you know what provision is made for paying overtime compensation to this employee?

A. I believe so.

Q. What is that arrangement?

A. He receives straight time for 46 hours and straight time for hours in excess of 46 hours, straight time in excess of 40 hours, in accordance with the established practice we have with the Treasury.

Q. Does he receive such additional straight time for all the hours he may work in a week?

A. No, up to 53.

Q. So if he works more than 53, as he did in four of these weeks, does he receive any compensation for such additional hours in excess of 53?

A. No, he gets nothing; he doesn't get in excess of 53.

Mr. Dill: What year was that?

The Witness: November 26 to December 30, 1944.

Q. I will hand you what has been marked as Plaintiff's Exhibit 5 and ask you to tell us what that is?

A. Peter Spooner for the same period.

Q. And what were the hours worked each work week in that period?

A. First four weeks were 59½ and nothing in the fifth.

Q. And would you say that the plan of compensation for employee Spooner is the same as for Mr. Page on Plaintiff's Exhibit 4 you have just testified concerning?

A. That is right. He would get paid for that fifth week, for the time he didn't work.

Q. Even though he didn't work for the week?

A. Yes.

Q. During four weeks he worked 59½ hours he received no compensation in excess of the 53 hours?

A. That is right, we are not permitted to compensate them.

Mr. Reynard: I offer both of those exhibits in evidence.

Q. Now, you say you are not permitted to pay them anything in addition. For what reason are you forbidden from paying them anything in addition?

A. By the Treasury rules.

Q. You mean the Salary Stabilization Unit of the Department of Internal Revenue?

A Yes.

Q. Do you know over what employees they have supervision?

A. Over supervisory, for one.

Q. Do you know what regulations they have promulgated in defining and limiting supervisory employees?

A. The number of the regulation?

Q. Are you familiar with those regulations?

A. I cannot repeat them.

Q. You know as a matter of fact they are identical to those promulgated by the Administrator of the Wage and Hour Division in defining its employees, don't you?

A. I cannot say that that is right.

Mr. Reynard: May I ask the Court to take judicial notice of that fact?

The Court: Or if counsel will stipulate it is true.

Mr. Smith: State it again, please.

Mr. Reynard: My point is simply this,—the defendant has contended they cannot pay more money to these employees pursuant to Salary Stabilization Unit regulations. I have asked the witness if he knows that the jurisdiction of Salary Stabilization extends only to those employees who are employed in a professional administrative or executive capacity, and to those whose salaries, I believe, are in excess of $5,000?

Mr. Smith: We will stipulate that is true.

Mr. Reynard: And further, the Commissioner of Internal Revenue, in defining executive, administrative and professional employees for the purpose of salary stabilization has adopted the identical regulations which the Ad-

ministrator of the Wage and Hour Division previously promulgated under the Wage and Hour Act, which are the regulations previously offered as Plaintiff's Exhibit 2.

Mr. Dill: We will stipulate that.

Mr. Smith: If your Honor please, in making that stipulation we don't want to have it confused,—and that when Salary Stabilization does take jurisdiction of certain people we are then subject to their rule. All this witness is trying to say is Salary Stabilization in taking jurisdiction of these four men has limited us to paying straight time overtime only to 53 hours; that is a limitation that Salary Stabilization put on this company.

Mr. Reynard: I think that is a matter of argument. Salary Stabilization does not attempt to assert any greater jurisdiction than it has under the regulations. My only point is that these men are not exempt for our purposes; they are not executives, so that the limitation Salary Stabilization has made does not exist.

Mr. Smith: We have to insist, whether Salary Stabilization is right or wrong, they still do make rules we have to follow.

The Court: Are you citing what was done here by the Stabilization agency as a justification or as authority for this classification?

Mr. Smith: Well, at least for what they have done in reference to that. As far as classification is concerned, of course it is fundamental management must classify its employees either as exempt or non exempt, periodically must do that. Now, it may make mistakes, that is true, but after management has classified its employees, both as to being exempt or non exempt, then we must follow certain procedures if we classify certain employees under the rules as non exempt.

The Court: There is no dispute about that, but I imagine there would be a dispute here if you are saying Stabilization made a classification which is binding.

Mr. Smith: Oh, no.

The Court: You made the classification.

Mr. Smith: And they accepted it. The same as we did

with the non-exempt; we did this for all our employees.

(Further argument.)

Mr. Smith: Only one other statement I would like to make in connection with this, on this particular question of salary stabilization,—since the first of this year the Salary Stabilization has permitted us to pay straight time for the hours between 53 and 59, or whatever hours they work in excess of 53, we can pay them straight time for that.

The Witness: That was just for a stated period. I assumed from his question he was asking about our regular procedure.

Mr. Reynard: My point is this. Once it is shown these individuals do not meet the regulations of classification they are no longer bound by Salary Stabilization. The Emergency Price Control Act creating the unit of Internal Revenue provides nothing to be done by that agency shall infringe upon the broad operations of the Fair Labor Standards Act.

The Court: I understand.

Q. Now, Mr. Russert, you have testified also this morning concerning an exchange of correspondence between Mr. Case and the Regional Attorney of the Department of Labor. Following Mr. Morgan's investigation at the plant and following the extended conferences between company representatives and the Department of Labor it is true, is it not, you received a letter on or about August 22, 1944, dated August 21, from the Regional Attorney of the Department of Labor, of which this is a copy?

A. It appears to be.

(Read to Court.)

Q. That copy is known as Reynard Exhibit 1 in attachment to the affidavit in the complaint in this case, is it not?

A. Yes.

Q. Did you ever reply to that letter?

A. I don't recall. I remember some of the circumstances, and I am not positive of that but it seems I was on vacation.

Q. Did you ever offer to discuss the matter with the writer of that letter?

A. I believe I was out of town, to the best of my knowledge, at that time.

Q. Did you at any time after that take any steps to conform the employment practices concerning these individuals who made the request set forth in the letter?

(Objection; overruled.)

The Court: Did you do anything to comply with the suggestions in that letter?

The Witness: Within our own organization?

The Court: Yes.

The Witness: No, other than what we have done.

Q. Now, this morning you testified at considerable length concerning your desire to comply with all rules and regulations and requests on the part of the union, and you had done so in connection with some other correspondence. Why is it you are so unwilling to conform your practice or meet with department representatives for the purpose of discussing this request?

(Objection; overruled.)

A. I feel we have been complying and we have spent considerable time going over this thing repeatedly with the Wage and Hour Division. We feel that is all that is necessary.

The Court: In other words, you think what you have done is in compliance with it?

The Witness: That is right.

Q. For what reason do you think they were in compliance?

(Objection; sustained.)

Q. You have no other reason other than the claim that (1) these men are executive, administrative or professional employees?

A. That is right.

Q. And (2) that they have been compensated fully in their salary. There is no other reason?

A. No other reason I know of.

Mr. Reynard: Very well, that is all.

RE-DIRECT EXAMINATION

By Mr. Smith:

Q. You have been handed Plaintiff's Exhibits 4 and 5 which are company records of the time schedules of Page and Spooner for a period from November 26 to December 30, 1944, showing 59½ hours work for four weeks for both men. Will you please state whether or not that was the regular schedule of working hours or whether that was a special situation?

Mr. Reynard: I object. It is entirely immaterial why the men may have worked more than 59 hours.

Mr. Dill: We can show a special situation, that the hours both before and after that period were not as long, and that, in addition, we made application, we made application to the Treasury Stabilization Unit for special permission to pay these people for this extra time over and above the consent we had received to pay up to 53 hours, and it had to do with a special plant problem. The period that is selected out of the records of the company to bring before the Court is not representative of the period in question.

Mr. Reynard: If the Court please, the statute says overtime shall be paid after 40 hours a week except in special circumstances. I think if a man has worked in excess of his normal schedule it is immaterial.

(Further argument.)

The Witness: I made a mis-statement this morning. May I correct it?

The Court: Yes.

The Witness: And that is that he asked the question whether we paid in excess of 53 hours at any time. I admitted and forgot about this special period of four or five weeks which the Treasury permitted us to pay overtime. If I remember correctly it was paying them for Sunday

work during the period they have in question. I am not positive at the moment which it was, whether it was straight time or double time.

The Court: Can you find out from your records?

The Witness: I can.

The Court: Well, I understand there was no dispute that some of your employees in question here are paid straight time for overtime.

Mr. Smith: That is right.

The Court: And it is the contention of the Administrator that it must be time and a half.

Mr. Reynard: That is right. I think that is freely admitted.

The Court: All of this discussion concerns only whether that was straight time for overtime or nothing at all. There is no claim made on the facts of the case it was time and a half.

Mr. Smith: That is right. There may be double time on that; I can't tell.

The Witness: I can't tell exactly from these records. We did pay them for the overtime of 8½ hours which they have taken exception to and which I stated; they were paid for that Sunday work.

Q. You got special approval?

A. Special approval.

Q. Of Salary Stabilization, to pay them?

A. Yes, sir.

The Court: But that wouldn't cover all overtime work during the period in question?

The Witness: This period in question, yes, it would, because they worked 8½ hours on Sunday which we did pay them for, and I believe possibly that "7" you have reference to, though I didn't make out the payroll and check the individuals, may have a bearing on this overtime problem. But they did receive compensation for that but I don't know whether straight time or overtime or double time. May I look at my files? I don't know whether it is in it or not.

The Court: Let me ask counsel for the Administrator, just to clear up an issue in my mind: Suppose it would

figure out what these men in question have received by salary and straight time for overtime would be as much as or more than they would have received if on a wage basis and receiving straight time and time and a half for overtime,—would you say that there was still a violation of the law?

Mr. Reynard: Yes, we would.

Mr. Ditto: That point has been considered a number of times by various courts, including the Supreme Court. If any other answer were possible, the entire overtime section would lose its meaning.

(Further argument.)

The Court: In other words, it is the contention of the Administrator, whatever the base rate of pay, no matter what you call it, salary or wages, if the man works overtime, more than 40 hours a week, he must have time and a half for that particular time based upon that base salary?

Mr. Reynard: Upon that total compensation. That is our contention.

Mr. Smith: The Belo case doesn't hold that, not if the base salary takes in the time and a half for overtime.

The Court: I was just eliciting from them their contention so that I understand the issue.

Q. Before the noon recess, Mr. Russert, you were approached by Mr. Reynard and Mr. Dittoe and asked for the records of the company as to hours of employment of these particular employees; is that right?

A. Yes.

Q. And you handed to them all of your records; is that correct?

A. Yes.

Q. For Page, Spooner, Payne and Stegman?

A. That is right.

Q. For Jasper Page, I will ask you whether or not those hourly records did not cover the entire year of 1944?

A. They do.

Q. And handing you another set for Peter Spooner, do they cover the entire year 1944?

A. They do.

Q. And is it not a fact that the records for Spooner and Page for all of the period except the special period covered by Plaintiff's Exhibits 4 and 5 show a total of 51 hours a week or less?

A. That is right, with one exception.

Q. You have one place where he worked—

A. 52½ hours.

Q. Now, will you explain to the court what was the reason for there being 59 hours for the four weeks, November through December, in the case of Spooner and Page; was that a regular scheduled situation or a special situation?

A. Special.

Mr. Dittoe: I renew my objection.

The Court: Objection will be overruled. I understand your point of law, and that ultimately will be given full consideration.

Q. Why was that 8½ hours additional; did they work that much overtime during the six-day week or work an extra day?

A. They worked an extra day.

Q. And that was a Sunday?

A. Yes.

Q. Will you tell the Court what you did with reference to Salary Stabilization to obtain approval for payment of that extra day?

The Court: He has answered that. He asked for a special order.

A. We asked for the five weeks.

Q. That was for the purpose of inventory control?

A. Yes.

Mr. Dill: I offer the entire records for the year as Defendant's Exhibits M and N.

RE-CROSS EXAMINATION

By Mr. Reynard:

Q. Mr. Russert, what arrangement did you have for paying any additional overtime to Mr. Stegman? So far

the discussion has been about Page and Spooner, the other two engineers. What about Stegman?

A. Stegman has been, as we previously stated, we treated him as an assistant chief engineer. He was on the old 49-hour regulation; he received no compensation for overtime other than the contract agreement or in excess of 49 hours. In other words, he stayed at the same fixed rate of pay even if he put in overtime, as I recall.

Q. But he gets no overtime or straight time, like Spooner, and Page; is that correct?

A. To my knowledge. I think he did receive some overtime.

Q. Will it refresh your recollection to look at Plaintiff's Exhibit 1, the list which you prepared and furnished to Mr. Morgan at the time of his investigation? Mr. Stegman appears on the second page under the heading "No overtime".

A. That is right.

Q. So that he is getting no overtime beyond and above his regular salary; is that correct?

A. That is right.

Q. What is his monthly salary, by the way?

A. $205.

Q. And what are the monthly salaries of Page and Spooner?

A. $210.

Q. And on top of that they get straight time for overtime?

A. That is right.

Q. So that they are both more highly paid than Mr. Stegman, both in terms of base pay and overtime?

A. That is because he had special consideration, his health being as it was, he could leave earlier, we wouldn't dock him for that day.

Q. Isn't it true both Page and Spooner are entitled to all the perquisites that go with the salaried position,—they are entitled to take time off for sickness without being docked?

A. That is right, but his is a special case, and the fact, as explained previous, his health was so bad at the

time he asked for relief from chief engineer to assistant, then he did take more time than any normal person or normal foreman would take, way and above. It was a special situation there that he would take more than a normal person would. I believe there might be on that sheet he did receive some overtime. May I see the payroll sheet? Didn't he receive some overtime?

Q. I think he did for a short time from January to June, 1943.

A. Because I think it shows he only worked 48 hours. He was treated more as a foreman, counsellor and adviser, as well as chief engineer.

Q. But still paid less than the others.

A. Five dollars.

Q. And the overtime. $5 on the base pay per month and he also doesn't receive the overtime that they receive each months; is that not correct?

A. That is.

Q. Now, you say Mr. Stegman is on a regular 48-hour schedule.

A. 48 or 49. 49, I believe—or 48, yes.

Q. I will hand you Plaintiff's Exhibit 6 purporting to be the time sheets for Fred Stegman for the year 1944 and ask you to examine them and tell me whether or not it is true during the entire year he worked less than 48 hours on only eight occasions?

A. It shows eight.

Q. That is the record for the whole year '44, isn't it?

A. That is right.

Mr. Reynard: We offer this in evidence.

The Court: Very well.

Mr. Reynard: That is all.

The Court: Any other witnesses?

Mr. Smith: We have a man here from the I. B. M. who is an expert, but in view of the Court's statement this morning, I am not sure whether the Court would want to hear from him on the perquisites of a job such as Mr. Payne has. It will be in the main repetitious. The only other testimony we propose would be Mr. Schmittgen's, our works manager, and his testimony would go to the

three engineers and would be largely repetitious and cumulative. It is a question of saving time and I would be glad to waive putting them on if it would be understood they would substantially testify the same.

The Court: I think that is a fair statement. I don't think it is necessary to hear them, and if counsel for the Government wish to cross examine them they may call them.

Mr. Reynard: No, I have no desire at all.

Mr. Smith: The only thing that there would be any controversy at all on the evidence as I have heard it would be the expert would testify definitely it would take a minimum of three to three and a half years to train a man to operate this particular department as it is operated at the General Industries Company.

The Court: Suppose it only took two years, what difference would it make?

Mr. Smith: There was some testimony by Mr. Payne the job only took a couple of months training, as I remember.

The Court: If I thought there was a dispute between the parties and counsel, of course, I would want to hear the testimony. I don't believe there is. I think you are both satisfied with the statement I made about it.

Mr. Reynard: We are satisfied, your Honor.

(Agreement photostatic copies of exhibits may be introduced in lieu of originals.)

BOTH SIDES RESTED.

(It was agreed the record taken stands as to both preliminary and final hearing.)

(Agreed both sides file main briefs within one week.)

PLAINTIFF'S EXHIBIT No. 2

Title 29, Chapter V

Code of Federal Regulations

Part 541

Regulations Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman"

Pursuant to Section 13 (a) (1)
of the Fair Labor Standards Act of 1938
(52 Stat. 1060)

(Revised January 1942)

UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

Part 541—

(First issued October 1938. Amended Regulations approved by the Administrator October 12, 1940, published in the Federal Register October 15, 1940 (5 F. R. 4077), and made effective as of October 24, 1940.)

Regulations

Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman"

Pursuant to Section 13 (a) (1) of the Fair Labor Standards Act of 1938

Section 541.1.—Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

Section 541.2.[2]—Administrative.

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

Section 541.3.—Professional.

The term "employee employed in a bona fide * * * professional * * * capacity" in section 13 (a) (1) of the act shall mean any employee who is—

(A) engaged in work—

(1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and

(2) requiring the consistent exercise of discretion and judgment in its performance, and

(3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and

(4) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the hours worked in the workweek by the nonexempt employees; provided that where such nonprofessional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as nonexempt work; and

(5) (a) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

(b) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee, and

(B) compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities); provided that this subsection (B) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.

Section 541.4.—Local retailing capacity.

The term "employee employed in a bona fide * * * local retailing capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) who customarily and regularly is engaged in

(1) making retail sales the greater part of which are in intrastate commerce; or

(2) performing work immediately incidental thereto such as the wrapping or delivery of packages, and

(B) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by such nonexempt employees.

Section 541.5.—Outside salesman.

The term "employee employed * * * in the capacity of outside salesman" in section 13 (a) (1) of the act shall mean any employee—

(A) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in

(1) making sales within the meaning of section 3 (k) of the act; or

(2) obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer, and

(B) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by such nonexempt employees; provided that work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

Section 541.6.—Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes. In determining such future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

U. S. GOVERNMENT PRINTING OFFICE: 1949

MEMORANDUM OPINION

(Filed April 16, 1945)

WILKIN, J.

The complaint sought an injunction to restrain defendant from violating Section 15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act of 1938. The amended answer admitted jurisdictional facts and said that the operations of the defendant had at all times complied with the provisions of said Act. The case was presented upon the evidence, arguments, and briefs.

The primary issue is whether the four employees involved in this action are exempt from the overtime provisions of Section 7 of the Act by virtue of Section 13(a)(1) and the regulations promulgated thereunder. A secondary issue is whether the monthly salary paid to the employees satisfies the overtime compensation requirements of Section 7. In other words, the court must determine, first, whether the employees were *bona fide* executive or administrative employees, and, second, if it finds that they were not, whether the amount paid for overtime was less than the minimum required by the Act.

Three of the employees, Jasper Page, Peter Spooner, and Fred Stegman, were operating engineers. They had engineer's licenses. They manned in three successive shifts the power plant of the defendant and were all under the direction of one Lattiman, who was "boss" over the whole power plant and boiler room. The defendant generated its own power and required high pressure steam in connection with the manufacture of plastic products. It was the duty of the engineers to keep the machinery of the power plant in good operating condition. They did packing, wiping, mopping, oiling, repairing, and such other duties as are generally performed by engineers in similar positions. There were in the power plant three generators, two compressors, pumps, engines, and other equipment. The engineers read the gauges, listened for sounds indicative of any disorder, made minor adjustments, and reported to their immediate superior any failure or breakdown for which they were unable to provide. Time was when the engineers gave directions to the employees in the boiler room. But recently because of

Union difficulties the boiler stokers declined to take orders from the engineers, except Lattiman, the chief engineer. It was of course the duty of the engineer in charge to take appropriate action to keep a supply of steam necessary to operate the plant. The power plant was dependent on steam from the boiler room.

Each of the three engineers was paid a salary of $210 a month and allowed certain other benefits, such as insurance, etc.

The fourth employee involved in this action, Clarence Payne, was assistant paymaster and worked directly under L. J. Monroe, who was paymaster. Most of his working time was spent in operating and adjusting tabulating machines. Two other employees served under the direction of Payne. The tabulating machines had to be altered and changed from time to time to meet the requirements of different reports. This employee had been given special training so that when he was informed as to what information was required by the various reports he would know how to shift and alter the tabulating machines in order to meet the requirements. He had necessarily to understand the purpose and requirements of the reports requested by government and company officials. The detail work of assembling the information was done by machinery rather than by clerks. The employees under Payne were machine operatives, whose work was conceded to be manual. This employee received a salary of $230 a month and other benefits.

It seems to the court that the three engineers meet the requirements of Section 541.1 of the regulations made pursuant to Section 13(a)(1) of the Act; in other words, it seems to the court justifiable for the company to class the engineers as executives. It may fairly be said that:

(A) Their primary duty was the management of the department or subdivision where they were employed.

(B) There were no other employees in that department or subdivision, but through the chief engineer they did direct the work of the boiler stokers. They had authority from the company to do so directly.

(C) Their recommendations as to change of status of other employees would be given particular weight. A boiler stoker would necessarily be subject to their suggestions.

(D) They customarily and regularly exercised discretionary powers. Complicated machinery vital to the plant was entrusted to their care.

(E) Their salary basis was not less than $30 a week.

(F) In the very nature of the situation it is difficult to say what per cent of the work done was of the same nature as that performed by non-exempt employees. But the evidence failed to convince the court that it exceeded 20% of the number of hours worked in the work week. It is questionable whether (F) should apply to these employees because they are in sole charge of the power plant, which is a rather independent establishment from the rest of the factory.

It seems to the court that the fourth employee, Payne, is justifiably classified as an administrative agent under Section 541.2 of said regulations:

(A) He is compensated for his services on a salary basis at a rate not less than $200 a month.

(B)(1) He regularly and directly assists an employee employed in a *bona fide* executive or administrative capacity (the paymaster), and a great deal of assistance is non-manual in nature and requires the exercise of discretion and independent judgment.

(2) He performs, under only general supervision, responsible non-manual work along specialized or technical lines requiring special training, experience, and knowledge and which requires exercise of discretion and judgment. The adjustment and alterations of the tabulating machines is technical and requires special training.

The main contention of the plaintiff was that the classification given to these employees was unwarranted and in violation of the regulations promulgated by the Administrator of the Act. The evidence failed to support that contention. Some latitude must be allowed employers.

The evidence fails wholly to convince the court that there was any intention on the part of the employer to circumvent or evade the requirements of the Act, or that the total payments made to these employees are below the minimum required by the Act if figured on the original unit labor cost basis. The evidence shows that the salaries were arrived at after negotiations with Union representatives and that in fixing the amount the company gave consideration to regular pay and time and a half for overtime. Subsequently there was an increase to the amount now being paid. It was approved by the Salary Stabilization Agency. The contention, therefore, that the present salary fails to take account of the requirement for time and a half for overtime is not sustained by the weight of the evidence. If that arrangement is to be set aside, then, in all fairness, the original rate should be restored or a new hour-rate would have to be agreed upon.

With reference to Payne, the company wrote a letter to the Wage and Hour Division setting forth the duties of the employee and asking how he should be classified. The Regional Attorney at that time thought the company would be justified in classifying the employee as exempt. The court does not mean to imply that the Administrator is bound by the opinion of the Regional Attorney based upon an *ex parte* presentation, but the court does consider that the action of the company sustains the finding of the court that the classifications were *bona fide*. The court furthermore feels that there is a necessity for considering certain employees as executives or administrators when they are entrusted with the complex and delicate machinery of modern times. It often requires as much skill, discretion and judgment to keep such machinery in harmonious operation as to keep subordinates in cooperation. Payne had charge not only of delicate and complex machinery but also other employees. The case for his exempt classification is even stronger that the case for the engineers.

The court does not discuss and distinguish the numerous cases cited. As courts have remarked, each stands upon its own facts. This court, however, relies on the principles

announced in *Walling* v. *Belo Co.*, 316 U. S. 624, syl. 1 and 2; *St. Clair* v. *Russell & Pugh Lumber Co.*, decided by the U. S. District Court of Idaho on July 3, 1943 (7 Labor Cases, Par. 61692); *Lynch et al.* v. *Vincent et al.*, U. S. District Court for Missouri, Feb. 25, 1944 (8 Labor Cases, Par. 62070); *Stranger et al* v. *Glenn L. Martin Co.*, U. S. District Court, Maryland, March 7, 1944 (8 Labor Cases, Par. 62196); *H. H. Allen* v. *Atlantic Co.*, (5th Cir. Ct. of Appeals) Nov. 16, 1944, (9 Labor Cases, Par. 62411).

R. N. WILKIN, *Judge.*

April 16, 1945.

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 14, 1945)

From the stipulations and admissions of the parties and from the evidence introduced at the trial in this cause, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is the duly appointed and qualified Administrator of the Wage and Hour Division, United States Department of Labor.

2. Defendant is an Ohio corporation having its principal office and manufacturing plant in Elyria, Ohio, within the jurisdiction of this Court.

3. Defendant is engaged in the manufacture and production of small electric motors and various plastic products, substantially all of which are regularly distributed in interstate commerce.

4. The three engineers involved in this case, Jasper Page, Peter Spooner and Fred Stegman, were normally employed forty-eight hours or more each workweek.

5. The engineers are compensated for their services as follows: Stegman receives fixed monthly salary of two hundred five dollars per month regardless of the number of hours he works during each workweek of the month. Page and Spooner receive a base monthly salary of two hundred ten dollars per month and in addition thereto receive overtime compensation at straight time only for the hours worked between forty-six and fifty-three during each workweek. No additional compensation is normally paid Page and Spooner for any hours worked in excess of fifty-three during any workweek.

6. The three engineers man the engine room in defendant's power plant in three successive shifts where they are all under the direction of one Latteman who is "boss" over the whole power plant including the engine room and the boiler room. They pack pumps, mop floors, wipe, oil and repair machinery and perform similar duties generally performed by engineers in similar positions. They read gauges and listen for sounds indicative of disorder in the various engines located in the engine room including three generators, two compressors, a number of pumps, engines and other equipment. In the event of disorder they make minor adjustments or report the disorder or breakdown to their immediate superior, Latteman, who is on twenty-four hour call. Substantially all of their time is spent in the performance of the duties enumerated above.

7. No other employees of defendant are employed in the engine room of the power plant, the firemen who stoke the boilers being employed in a separate room located adjacent to the engine room in the power plant.

8. Since 1939 the engineers have not had or exercised any supervisory authority over the work of the firemen employed in the boiler room or any other employees employed by defendant.

9. The employee Clarence Payne, defendant's assistant paymaster and chief tabulating operator, worked directly under defendant's paym[redacted]er and spent most of his working time in operating and adjusting tabulating machines

and in filling out various routine clerical reports. He was assisted by and directed the services of two other employees in the performance of his work.

10. Payne was normally employed for a forty-eight hour workweek and was compensated on a salary basis of two hundred thirty dollars a month plus overtime at straight time for the hours between forty and forty-eight but received no additional compensation for any hours of employment in excess of forty-eight per week.

CONCLUSIONS OF LAW

1. The three engineers, Page, Spooner and Stegman, are not bona fide executive, administrative or professional employees within the meaning of Section 13(a)(1) of the Fair Labor Standards Act of 1938 as those terms are defined and delimited by the Administrator's Regulations (Title 29, Chapter V, Code of Federal Regulations, Part 541, Sections 541.1-3).

2. Employee Payne is not a bona fide executive, administrative or professional employee within the meaning of Section 13(a)(1) of the Act as those terms are defined and delimited by the Administrator's Regulations (Title 29, Chapter V, Code of Federal Regulations, Part 541, Sections 541.1-3).

3. Defendant has failed to compensate employees Page, Spooner, Stegman and Payne for their overtime employment at rates not less than one and one-half times the regular rates at which they are employed as required by Section 7 of the Act.

4. Plaintiff is entitled to the issuance of an injunction restraining defendant from further violations of Sections 15(a)(1) and 15(a)(2) of the Act.

Approved as to form only.

REESE DILL,
Attorney for Defendant.

Approved as to form and substance.

CHARLES A. REYNARD,
Attorney for Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 14, 1945)

This cause came on for trial and the Court having heard the evidence and considered the stipulations of the parties finds the facts and states the conclusions of law as follows:

Findings of Fact

(1) That the defendant is and has been for some time prior to October 24, 1938, a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal office, place of business and manufacturing plant at Olive and Taylor Streets in the City of Elyria, Ohio.

(2) That the defendant is and has been for some time prior to October 24, 1938, an employer of a large number of employees engaged in the manufacture of metal and plastic products, which are sold, distributed, transported and delivered to various customers throughout the United States.

(3) That among the employees of the defendant throughout the entire period from October 24, 1938 to September 20, 1944, the date of the filing of this action, were Clarence Payne, employed continuously in the defendant's Payroll Department, and Jasper Page, Peter Spooner and Fred Stegman, employed continuously in the defendant's Steam and Electric Power Generating and Heating Department.

(4) That Clarence Payne was compensated on a salary basis in accordance with the following schedule during the period from January 1, 1939 to December 31, 1944:

PERIOD	MONTHLY SALARY
Jan. 1, 1939—Aug. 15, 1940	$165.00
Aug. 15, 1940—May 1, 1941	170.00
May 1, 1941—Aug. 1, 1941	180.00
Aug. 1, 1941—Jan. 1, 1942	190.00
Jan. 1, 1942—Apr. 15, 1942	200.00
Apr. 15, 1942—Oct. 1, 1942	205.00
Oct. 1, 1942—July 1, 1943	215.00
July 1, 1943—Dec. 31, 1944	235.00

That Clarence Payne was compensated for overtime in accordance with the Fair Labor Standards Act from January 1, 1939 to December 31, 1941; that from January 1, 1942 to July 1, 1943, Clarence Payne received no compensation for overtime in addition to his salary on the basis that he was an exempt employee under the Fair Labor Standards Act; that from July 1, 1943 to December 31, 1944 Clarence Payne received an amount equivalent to straight-time overtime for hours worked in excess of forty (40) hours per week, pursuant to express approval from the Salary Stabilization Unit of the United States Treasury Department under the wage stabilization provisions of the Emergency Price Control Act of 1942, based on a finding by the Salary Stabilization Unit that it was permissible for the Company to pay such straight-time overtime as a salary increase for an exempt employee under the Fair Labor Standards Act.

That Clarence Payne received year-end Christmas bonuses of $25.00 in 1942, 1943 and 1944 and, as in the case of other salaried employees of the defendant, received certain group life insurance and pension benefits, sick leave and vacations with pay not given to hourly non-exempt employees.

(5) That Jasper Page was compensated on a salary basis in accordance with the following schedule during the period from February 1, 1941 to December 31, 1944:

PERIOD	MONTHLY SALARY
Feb. 1, 1941—Aug. 1, 1941	$185.00
Aug. 1, 1941—Mar. 10, 1942	195.00
Mar. 10, 1942—Dec. 31, 1944	210.00

That Jasper Page received no compensation for overtime in addition to his salary during the period from February 1, 1941 to December 31, 1944, except in accordance with the following schedule of payments by the defendant pursuant to express approval from the Salary Stabilization Unit of the United States Treasury Department under the wage stabilization provisions of the Emergency Price Control Act of 1942, based on a finding by

the Salary Stabilization Unit that it was permissible for the defendant to pay such straight-time overtime as a salary increase for an exempt employee under the Fair Labor Standards Act:

PERIOD	BASIS OF PAYMENT
June 1, 1943 to Dec. 15, 1943	Straight-time overtime pay for hours worked in excess of 49 hours per week, up to a maximum of 53 hours per week.
Dec. 15, 1943 to Dec. 31, 1944	Straight-time overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week.

That Jasper Page received year-end Christmas bonuses of $25.00 in 1943 and 1944 and, as in the case of other salaried employees of the defendant, received certain group life insurance and pension benefits, sick leave and vacations with pay not given to hourly non-exempt employees;

(6) That Peter Spooner was compensated on a salary basis in accordance with the following schedule during the period from February 1, 1941 to December 31, 1944.

PERIOD	MONTHLY SALARY
Feb. 1, 1941—Apr. 1, 1941	$180.00
Apr. 1, 1941—Aug. 1, 1941	185.00
Aug. 1, 1941—Mar. 10, 1942	195.00
Mar. 10, 1942—Dec. 31, 1944	210.00

That Peter Spooner received no compensation for overtime in addition to his salary during the period from February 1, 1941 to December 31, 1944, except in accordance with the following schedule of payments by the defendant pursuant to express approval from the Salary Stabilization Unit of the United States Treasury Department under the wage stabilization provisions of the Emergency Price Control Act of 1942, based on a finding by

the Salary Stabilization Unit that it was permissible for the defendant to pay such straight-time overtime as a salary increase for an exempt employee under the Fair Labor Standards Act:

PERIOD	BASIS OF PAYMENT
June 1, 1943 to Dec. 15, 1943.....	Straight-time overtime pay for hours worked in excess of 49 hours per week, up to a maximum of 53 hours per week.
Dec. 15, 1943 to Dec. 31, 1944.....	Straight-time overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week.

That Peter Spooner received year-end Christmas bonuses of $25.00 in 1943 and 1944 and, as in the case of other salaried employees of the defendant, received certain group life insurance and pension benefits, sick leave and vacations with pay not given to hourly non-exempt employees.

(7) That Fred Stegman was compensated on a salary basis in accordance with the following schedule during the period from January 1, 1939 to December 31, 1944:

PERIOD	MONTHLY SALARY
Jan. 1, 1939—Nov. 15, 1939.....	$200.00
Nov. 15, 1939—Mar. 10, 1942.....	190.00
Mar. 10, 1942—Dec. 31, 1944.....	205.00

That Fred Stegman received year-end Christmas bonuses of $50.00 in 1943 and 1944 and, as in the case of other salaried employees of the defendant, received certain group life insurance and pension benefits, sick leave and vacations with pay not given to hourly non-exempt employees.

(8) That Clarence Payne was employed in the Payroll and Tabulating Department of the defendant as Assistant Paymaster and in that capacity was required to super-

vise the work of seven (7) other employees in the Department; that there were no other executive or administrative assistants to the Paymaster; that the duties of the Department were to prepare, record, tabulate and furnish to the defendant payrolls for employees totaling approximately $50,000.00 per week, sales records, analyses and reports, old age and unemployment reports, cost records and reports, including purchase vouchers, material requisitions and scrap records, and other reports required by the defendant for Governmental and statistical purposes; that set-ups for tabulating this information on International Business Machine tabulators required the preparation of plug boards with over a thousand varying electrical connections, which plug boards had to be altered and changed from time to time to meet the requirements of different reports; that Payne had been given special training so that when he was informed as to what information was required by the various reports he would know how to shift and alter the tabulating machines in order to meet these requirements; that he had to understand the purpose and requirements of the reports requested by Government and defendant's officials; that after preparation of the plug boards and adjustment of the equipment the detail work of assembling the information was done by machinery rather than by clerks; that the employees under Payne's supervision were machine operators whose work was manual; that during the absence of the Paymaster, Payne had complete supervision over the entire Department.

That Payne was regularly compensated for his services on a salary basis at a rate of not less than $200.00 a month; that Payne regularly and directly assisted an employee employed in a bona fide executive or administrative capacity, and such assistance was non-manual in nature and required the exercise of discretion and independent judgment; that Payne performed under only general supervision responsible non-manual office work directly related to management policies and general business operations along specialized technical lines which required special training, experience and knowledge, and which required the exercise of discretion and independent judgment.

(9) That Jasper Page, Peter Spooner and Fred Stegman were all licensed operating engineers and were employed as foremen or supervisors of the continuous three-shift operation of the Steam and Electric Power Generating and Heating Department of the defendant under a Chief Engineer in charge of the entire Department, and in that capacity were directed by the defendant to supervise the work of firemen and coal passers on their respective shifts; that there were no other foremen or supervisors in the Department; that Stegman, in addition to being a foreman, had charge of the entire department in the absence of the Chief Engineer; that in the said Department were four large steam boilers and three large direct current electrical generators costing approximately $40,000.00 each, as well as compressors, pumps, engines and other equipment; that the steam boilers were required to maintain continuously a steam pressure of one hundred fifty (150) pounds for use in the molding of plastics, while the electrical generators generated electrical power for use in the manufacture of metal and plastic products of the defendant; that the size of the equipment and requirements for steam and power were unusually large for manufacturing plants; that in the operation of their respective shifts they were required to keep the machinery of the Department in good operating condition by packing, wiping, mopping, oiling and making emergency repairs to the equipment; to read gauges, to listen for sounds indicative of any disorder; to make minor adjustments; to take appropriate action to supply steam necessary to operate the power plant which was dependent upon steam from the boiler room, and to report to their immediate superior any failure or breakdown for which they were unable to provide; that their primary duty consisted of the management of the Electric and Steam Generating and Heating Department of the defendant during their respective shifts.

That they customarily and regularly directed the work of other employees in the Department; that their recommendations and suggestions as to change of status of other employees would be given particular weight; that

they customarily and regularly exercised discretionary powers and were entrusted with the care of vital, dangerous and complicated machinery requiring the exercise of discretion to maintain continuous operation; that their salary basis was not less than $30.00 per week; that they did not perform work of the same nature as that performed by non-exempt employees for more than twenty per cent (20%) of the number of hours worked in the work week by the non-exempt employees under their direction.

(10) That prior to February 1, 1941 the Shift Foremen or Supervisors in the Steam and Electric Power Generating and Heating Department were compensated on an hourly rate; that the International Brotherhood of Firemen, Oilers and Helpers, Local No. 198, of Elyria, Ohio, claimed the right to represent the Shift Foremen as supervisors and through negotiations with the defendant in their behalf arrived at an agreement that they would be compensated on a monthly salary basis, sufficient in amount to compensate them under the Fair Labor Standards Act for regular and overtime employment at the regular hourly rate of pay they were receiving prior to February 1, 1941; that the defendant and the Union agreed to submit to the National Labor Relations Board the issue of the right of the Union to represent the Shift Foremen or Supervisors.

That pursuant to such agreement the Shift Foremen were changed to a salary basis on February 1, 1941 and the defendant, in order to avert the threat of a strike by the Union, dealt with the Union as the bargaining agent for the Shift Foremen pending a decision by the National Labor Relations Board of the right of the Union to represent them; that the amount paid in salary to Jasper Payne, Peter Spooner and Fred Stegman was more than the amount which they would have earned at the regular hourly rate of Eighty Cents (80c) per hour paid prior to February 1, 1941, plus overtime pay under the Fair Labor Standards Act at the rate of time and one-half the regular hourly rate of pay for the scheduled work week of fifty-one (51) hours per week.

That on July 25, 1944 Peter Spooner, Jasper Page and Fred Stegman signed an agreement with the defendant reading as follows:

"We the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges and continue on a salary basis."

That on August 18, 1944, the Union, in its written contract with the defendant, agreed to settle the issue of the Union's right to represent Spooner, Page and Stegman by excluding them from the bargaining unit and abandoning their claim of the right to collectively bargain for Shift Foremen or Supervisors.

11. That throughout the period in question the defendant never intended to circumvent or evade the Requirements of the Fair Labor Standards Act, nor intended that compensation paid to its employees was to be any less than the minimum required by the Act; that with reference to Clarence Payne the defendant wrote a letter, dated June 19, 1943, to the Wage and Hour Division of the United States Department of Labor setting forth the duties of his position as proven in this case and asking how he should be classified; that the Regional Attorney, Charles Reynard, answered this letter and expressed the opinion that the defendant would be justified in classifying Payne as an exempt administrative employee; that the defendant has been bona fide in its classification and employment of its employees in executive, administrative and professional capacities.

(12) That the defendant has maintained adequate records of wages paid to and hours worked by its employees and its other conditions of employment.

(13) The Administrator of the Wage and Hour Division, United States Department of Labor, in October, 1938, pursuant to the authority conferred upon him by Section 13(a) of the Fair Labor Standards Act of 1938, duly issued and promulgated regulations defining and delimiting the terms "any employee employed in a bona fide executive (or) administrative capacity" as used in Section 13(a) of said Act.

(14) The Administrator of the Wage and Hour Division, United States Department of Labor, in October, 1938, pursuant to the authority conferred upon him by Section 11(c) of the Fair Labor Standards Act of 1938, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours and other conditions of employment to be made, kept and preserved by every employer subject to the Act.

CONCLUSIONS OF LAW

(1) That the Court has jurisdiction of the action by virtue of Section 17 of the Fair Labor Standards Act of 1938.

(2) That the defendant is an employer engaged in the production of goods for interstate commerce and subject to the provisions of the Fair Labor Standards Act, of 1938.

(3) That the defendant has compensated its non-exempt employees for employment in excess of forty-four (44) hours per week during the period October 24, 1938 to October 24, 1939, in excess of forty-two (42) hours per week during the period October 24, 1939 to October 24, 1940, and in excess of forty (40) hours per week since October 24, 1940, at rates not less than one and a half (1½) times the regular rate at which they were employed.

(4) That Clarence Payne is an employee of the defendant employed in a bona fide administrative capacity and exempt from the provisions of the Fair Labor Standards Act of 1938 by virtue of Section 13(a) of said Act and Section 541.2 of the Regulations of the Administrator of the Wage and Hour Division of the United States Department of Labor.

(5) That Jasper Page, Peter Spooner and Fred Stegman are employees of the defendant employed in a bona fide executive capacity and exempt from the provisions of the Fair Labor Standards Act of 1938 by virtue of Section 13(a) of said Act and Section 541.1 of the Regulations of the Administrator of the Wage and Hour Division of the United States Department of Labor.

(6) That the defendant has made, kept and preserved adequate records of its employees and the wages, hours and other conditions and practices of employment maintained by it as prescribed by the Fair Labor Standards Act of 1938 and the Regulations of the Administrator of the Wage and Hour Division of the United States Department of Labor.

(7) That the defendant is not in violation of Sections 7, 11(c), 15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act of 1938, and that the application of the Administrator for injunctive relief is not proper and lawful.

R. N. WILKIN, *Judge.*

Approved as to form only:

CHARLES A. REYNARD,
Attorney for Plaintiff.

Approved as to form and substance.

REESE DILL,
Attorney for Defendant.

JUDGMENT

(Filed May 5, 1945)

This cause came on to be heard on March 22, 1945, and by consent of counsel the motion of the plaintiff for a preliminary injunction was heard, together with the complaint of the plaintiff for a permanent injunction, the evidence was presented, the cause was argued by counsel and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that the motion of the plaintiff for a preliminary injunction is overruled, the prayer of the complaint for a permanent injunction is

denied, and the complaint is dismissed. No costs are taxed to either party.

R. N. WILKIN, *Judge.*

Dated: .....

Notice by Clerk hereby waived.

APPROVED: as to form only
CHARLES A. REYNARD,
Attorney for Plaintiff.
REESE DILL,
Attorney for Defendant.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

(Filed July 10, 1945)

Notice is hereby given that the plaintiff, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this action on May 5, 1945.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
CHARLES A. REYNARD,
Regional Attorney,
FRANK R. DITTOE,
Attorney,
Attorneys for Appellant.

A copy of this notice has been
mailed to defendant's attorneys
this 10th day of July, 1945.
CHARLES A. REYNARD,
Attorney for Appellant.

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

(Filed July 10, 1945)

To the Clerk of the above-named Court:

In accordance with rule 75(a) of the Federal Rules of Civil Procedure, you are hereby requested to make a transcript of portions of the record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to the notice of appeal filed by the plaintiff in the above-entitled cause, in accordance with the following designation:

1. All docket entries.
2. The complaint.
3. Order to show cause and supporting affidavits of Howard B. Morgan and Charles A. Reynard.
4. The answer.
5. The amended answer.
6. Minutes of the trial, before Hon. Robert N. Wilkin, United States District Judge, on March 22 and March 23, 1945, inclusive.
7. Plaintiff's exhibits 1, 2, 3, 4 and 5.
8. Defendant's exhibits J, K, L, M and N.
9. Opinion, Hon. Robert N. Wilkin, United States District Judge, filed April 16, 1945.
10. Plaintiff's proposed findings of fact and conclusions of law.
11. Findings of fact and conclusions of law, Hon. Robert N. Wilkin, United States District Judge, filed June 15, 1945.
12. Judgment, rendered May 5, 1945.
13. Notice of appeal, filed July 10, 1945.
14. Designation of portions of record to be contained in the record on appeal.

Said transcript is to be prepared as required by law and the rules of this Court and the Federal Rules of Civil Procedure, and is to be filed in the office of the Clerk of

the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio, on or before the 19th day of August, 1945.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
CHARLES A. REYNARD,
Regional Attorney,
FRANK R. DITTOE,
Attorney,
United States Department
of Labor,
Attorneys for Plaintiff.

A copy of the above designation has been mailed to defendant's attorneys this 10th day of July, 1945.

CHARLES A. REYNARD,
Attorney for Plaintiff.

STIPULATION AS TO EXHIBITS

(Filed August 1, 1945)

We, the attorneys for the respective parties, do hereby stipulate that Plaintiff's Exhibits 1, 2, 3, 4 and 5 and Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and N may be withdrawn for the purpose of the appeal being taken to the Circuit Court of Appeals and that the

Court may enter an order accordingly, notice by the Clerk being hereby waived.

CHARLES A. REYNARD,
FRANK R. DITTOE,
Attorneys for Plaintiff.
REESE DILL,
Attorney for Defendant.

It is so ordered:

R. N. WILKIN,
U. S. District Judge.

CERTIFICATE OF CLERK

NORTHERN DISTRICT OF OHIO, } ss:
EASTERN DIVISION }

I, C. B. Watkins, Clerk of the United States District Court within and for said district, hereby certify that the foregoing typewritten pages are full, true and complete copies of original pleadings and docket entries constituting the transcript of record on appeal in the within cause, which original papers, except certain original exhibits withdrawn by order of the Court, remain in my custody as clerk of said court.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district, this 6th day of August, A. D. 1945.

(SEAL) C. B. WATKINS, *Clerk.*

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Plaintiff-Appellant,

vs.

THE GENERAL INDUSTRIES COMPANY.
Defendant-Appellee.

} Civil Action

STIPULATION

(Filed August 22, 1945)

It is hereby stipulated by and between the parties by their respective counsel that, for the purpose of the appeal heretofore taken in this case, Plaintiff's Exhibits 1, 3, 4 and 5 and Defendant's Exhibits A through N, inclusive, need not be reproduced in the printed record because of the excessive cost which would otherwise be incurred in such reproduction, and that they may be offered in their original form as physical exhibits and be made a part of the file in the case.

Approved by Counsel for Plaintiff-Appellant:

CHARLES A. REYNARD,
FRANK R. DITTOE.

Approved by Counsel for Defendant-Appellee:

GLEN O. SMITH,
REESE DILL.

TRANSCRIPT OF PROCEEDINGS FOR CERTIORARI APPLICATION

Cause argued and submitted

April 12, 1946

Before: HICKS, ALLEN, and MILLER, JJ.

This cause is argued by Morton Liftin for Appellant and by M. Reese Dill for Appellee and is submitted to the court.

Judgment

Entered May 28, 1946

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

United States Circuit Court of Appeals, Sixth Circuit

No. 10078

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

THE GENERAL INDUSTRIES COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Ohio

Decided May 28, 1946

Filed May 28, 1946. John W. Menzies, Clerk.

Before HICKS, ALLEN, and MILLER, Circuit Judges.

ALLEN, Circuit Judge. The Administrator sought to enjoin the appellee from alleged violation of the Fair Labor Standards Act, 29 U. S. C., § 201 et seq. The District Court, sitting without a jury, found that the appellee had not violated the Act; that the

employees in question were exempt, and refused the relief prayed for.

The Administrator claims that the appellee has refused to compensate four of its employees for overtime work in accordance with the requirements of § 7 and § 15 (a) (2) of the Act, 29 U. S. C., § 207 (a) and § 213 (a). The applicable statutes read as follows:

"§ 207 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section.

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

"§ 213 (a). The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional or local retailing capacity, * * * (as such terms are defined and delimited by regulations of the Administrator). * * *

It is conceded that all of the employees are engaged in the production of goods for commerce. Three of them, Jasper Page, Peter Spooner, and Fred Stegman, are licensed operating engineers in appellee's steam and electric power generating and heating department. This department is vital to the operation of appellee's business, and is in continuous operation on a three-shift basis. Each man is responsible for an eight-hour shift. Except when the chief engineer, Latteman, is present in the department, which generally occurs on Stegman's shift, each of the three engineers is the sole employee in the power plant during his shift. In the boiler room, which is a contiguous part of the department, firemen and coal-passers are employed whose duty is to maintain a high and constant steam pressure essential to the work of the power plant. As operating engineers, Stegman, Page, and Spooner are in charge of four large steam boilers, three large direct current electrical generators, compressors, pumps, engines, and other mechanical equipment. The three engineers are individually responsible during their respective shifts for the operation of this machinery, and for keeping it in good condition. They are required to pack the waterpumps, to wipe and oil the engines, and to make minor emergency repairs. They mop the floors and do everything necessary to keep the plant clean and in proper work-

ing condition. They make minor adjustments, read the gauges, and are constantly on watch for indications of trouble. Stegman, who works on the first shift under Latteman, the chief engineer, is regarded as having charge of the department when Latteman is away, but no one else is present during his shift except Latteman. Each of the three men receives a salary in excess of $200 per month and is paid additional straight time for overtime.

The fourth employee, Clarence Payne, is employed in the pay roll and tabulating department as assistant paymaster. He has charge of the international business machines equipment and has two assistants who manipulate the machines. Payne sets the machines up to make the desired tabulations by arranging the plug-boards on the tabulators. The time-cards, which are tabulated, carry 280 columns, and each column has 80 possible punches. Many thousands of complex combinations in setting the connections on the plug-board are shown to exist. The type of data obtained varies and includes preparing, recording, tabulating, and furnishing to appellee pay rolls for employees as well as records, analyses, and reports and other information as desired. In the paymaster's absence Payne is in complete charge of the department. He is compensated in excess of $200 per month and an amount equivalent to straight time overtime for work in excess of 40 hours per week. Payne testified at first that he spent one hour and a half a day in supervision; but he later stated in effect that for some time his work had been changed, and that most of his time was spent with the paymaster in going over procedure, assisting in correspondence, and consulting with his assistants in the tabulating department whenever necessary. It clearly appears from his explanatory testimony that more than 80% of Payne's work is nonmanual.

No question is raised as to the validity of the regulations. Two problems are presented: (1) Whether the four employees or any of them are exempted from the Act under the regulations, and (2) whether, regardless of exemption, they have been receiving compensation in accordance with the Act. The pertinent portion of the regulations is printed in the margin.[1]

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[1] SECTION 541.1, Executive.
The term "employee employed in a bona fide executive * * * capacity" in section 13 (a) (1) of the act shall mean any employee—
(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and
(B) who customarily and regularly directs the work of other employees therein, and
(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and
(D) who customarily and regularly exercises discretionary powers, and
(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and
(F) whose hours of work of the same nature as that performed by non-exempt employees do not exceed 20 percent of the number of hours worked in the workweek by the non-exempt employees under his direction; provided that this subsection (F)

The Administrator claims that of the six requirements contained in the definition of executive, only that relating to compensation has been complied with as to Stegman, Spooner, and Page, and that as to Payne, only the requirement as to compensation has been complied with under the definition of an administrative employee.

Whether or not employees are exempt under the Act is primarily a question of fact. Fletcher v. Grinnell Bros., 150 Fed. (2d) 337, 340 (C. C. A. 6). The burden of proving that an employee is exempt rests upon the one who claims the exemption. Smith v. Porter, 145 Fed. (2d) 292, 294 (C. C. A. 8). The District Court, in carefully separated findings of fact, determined that the work of the three engineers met each of the six tests prescribed by § 541.1, and that that of the assistant paymaster met the test imposed by § 541.2. These findings may not be set aside on appeal unless clearly erroneous. United States v. Madsen Construction Co., 139 Fed. (2d) 613, 615 C. C. A. 6).

The case of the engineers is one of the border-line cases which necessarily exist even in small industrial organizations. The District Court found as a fact that Stegman, Page, and Spooner were employed as foremen or supervisors of the department, with power to supervise the work of firemen and coal passers in the boiler room; that they customarily and regularly directed the work of other employees in the department, and customarily exercised discretionary powers. We think these findings are not sustained by the evidence. The work done by the engineers was highly skilled mechanical work. While the machinery was vital to the plant, dangerous and complicated, its operation involved no exercise of discretion, but merely the proper application of the skilled engineering training which these men had received. Although the three engineers were responsible for the proper operation of the machinery during their shifts, and, as the factory manager testifies, "in charge of management of the property," none of them

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shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

SECTION 541.2. Administrative.

The term "employee employed in a bona fide • • • administrative • • • capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is non-manual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible non-manual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special non-manual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

could fire or hire or give orders to any man in the boiler room. Latteman, the chief engineer, who was present at the plant during one shift and on call 24 hours a day and seven days a week, was in full charge of the department. While Latteman might act on information from Stegman, Page, or Spooner, during the period involved, orders emanated only from him. It is not shown that Stegman, Page, or Spooner ever made any recommendation concerning the change in status of the boiler men. It was essential to have proper steam pressure in the boiler room, but if the three engineers desired in this connection to secure action from the firemen and coal passers, they had to secure an order from Latteman. This evidence is not contradicted.

The most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Walling, Admr. v. Yeakley, 140 Fed. (2d) 830, 832 (C. C. A. 10). The difficulty of the immediate problem arises from the fact that the regulations make no allowance for the employment involved. In the shift from hand labor to mechanized industry the work of men is increasingly done by machines. Time was when engineers responsible for the work of such a vital operation probably had men under them perform operations now done entirely by machinery. Here no employee except the engineer himself is present during the shift. The engineer thus does not supervise, control, or manage any other employee. But it is an essential of executive duties, both in common parlance and under the regulations, that there be active participation in controlled supervision and management of the business. Arkansas Amusement Corp. v. Kempner, 57 Fed. (2d) 466, 473 (C. C. A. 8); Stanger v. Glenn L. Martin Co., 56 Fed. Supp. 163, 166; Knight v. Mantel, 135 Fed. (2d) 514, 517. Cf. Emmerglick v. Philip Wolf, Inc., 138 Fed. (2d) 661, 662 (C. C. A. 2); Schanck v. Lehigh Valley Rd. Co., 52 N. Y. S. (2d) 491, 492.

The Administrator might well have recognized the importance of responsibility for complex mechanical equipment and have included in the regulations a paragraph to the effect that as a test of executive work the management of vital, dangerous and complicated machinery is equivalent to the management or supervision of employees, but he has not done so. The Congress has confided to the Administrator the framing of the regulations and the courts may not add provisions to those embodied in statute even though such provisions appear from a practical standpoint to be reasonably required.

As to Payne, a different situation is presented. He was in direct authority over two men and five women who performed the actual manual work of his department. The setting of the plugs which

he himself performed was a highly intelligent piece of work, involving far more than routine mechanical skill. The District Court's finding that Payne regularly and directly assisted an employee employed in a bona fide executive or administrative capacity in nonmanual work, and also that he performed only under general supervision responsible nonmanual office work requiring the exercise of discretion and independent judgment is strongly supported by the record. Payne's case falls squarely within § 541.2 and he is exempt from the operation of the statute.

These conclusions would seem to require reversal of the judgment as to Stegman, Spooner, and Page, and affirmance of the judgment as to Payne. However, the circumstance that the three engineers are not exempt does not of itself establish that the District Court erred in denying the injunction. In an action to restrain violations of the Act the burden of proof rests on the Administrator to establish that the statute has been violated as to the engineers. The District Court found no evidence of intention to violate the act and affirmatively found that the employer had compensated the engineers in accordance with the statute. There was a conflict of evidence on this point but the finding of the District Court is supported by substantial evidence. While the men state that they received no overtime, their testimony is lacking in circumstantial detail, while the testimony of the factory manager and one other witness is precise upon the exact point. The salary of these men was formerly paid on an hourly basis. A change to a salary basis was negotiated between the union and the employer, the salary being calculated to include an allowance of time-and-one-half for overtime. The men concede that there was a controversy with the union over their status, and that the shift from hourly to monthly compensation followed. The pay was figured in a shift from hourly pay to monthly salary, at 80 cents an hour, which was the amount they would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled workweek of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time their salary includes an allowance of one-and-one-half pay for overtime. The District Court was correct in its conclusion that the appellee has compensated its nonexempt employees for overtime employment in accordance with the requirements of the Act, and the injunction was properly denied.

The judgment of the District Court is affirmed.

In the United States Circuit Court of Appeals for the Sixth Circuit

No. 10078

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

GENERAL INDUSTRIES COMPANY, APPELLEE

Appeal from the District Court of the United States for the Northern District of Ohio

Petition for rehearing

Filed June 17, 1946

Appellant respectfully petitions the Court for rehearing of its decision of May 28, 1946, in this case, on the question whether appellee paid overtime compensation to its engineers in accordance with the requirements of the Fair Labor Standards Act. We respectfully request the Court to reexamine that portion of its decision (p. 7) which rests on the theory that the overtime provisions of Section 7 of the Fair Labor Standards Act do not require the payment of compensation, in addition to the monthly salaries paid here, for hours worked in excess of 40 each week.

The decisions of the Supreme Court in Overnight Motor Co. v. Missel, 316 U. S. 572, and Floyd v. DuBois Soap Co., 317 U. S. 596, reversing 41 N. E. (2d) 393, 139 Ohio St. 520,[1] and the decision of every circuit court of appeals (including this Court) which has considered this problem, clearly establish that employment on a salary basis for hours in excess of the statutory maximum without the payment of additional overtime compensation does not constitute compliance with the Act.[2] This rule was not applied here apparently because the Court believed that the salaries paid included both straight time and overtime based on the hourly rates in effect when the method of compensation was changed from an hourly to a salary basis.

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[1] The Missel case involved a salary for a varying number of hours per week; the Floyd case involved a salary for a fixed number of hours per week.

[2] Bumpus v. Continental Baking Co., 124 F. (2d) 549 (C. C. A. 6), certiorari denied 316 U. S. 704; Walling v. Stone, 131 F. (2d) 461 (C. C. A. 7); Patsy Oil & Gas Co. v. Roberts, 132 F. (2d) 826 (C. C. A. 10); Seneca Coal & Coke Co. v. Lofton, 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772; Adams v. Union Dime Savings Bank, 144 F. (2d) 290 (C. C. A. 2), certiorari denied 323 U. S. 751; Wilson v. Shuman, 140 F. (2d) 644 (C. C. A. 8); Hudson Coal Co. v. Watkins, 151 F. (2d) 311 (C. C. A. 3), certiorari denied 66 S. Ct. 522; Castle v. Walling, 153 F. (2d) 923 (C. C. A. 5). A different result may obtain in cases where the salary is accompanied by a specified hourly rate. General Mills v. Williams, 132 F. (2d) 367 (C. C. A. 6). But no hourly rates were specified for any of these employees, after they were transferred to a salary basis, and their salaries were raised on several occasions. Thus, Walling v. Belo, 316 U. S. 624, on which appellee rested its case (see appellee's brief, p. 10), is not in point here since the Supreme Court specifically relied on the fact that the Belo contract set forth the regular hourly rate at which the employees were employed.

We submit that even assuming this to be the case when the change to a salary was accomplished, the record is undisputed (1) that the salary of Stegman was never based upon any hourly rates, and (2) that the salaries paid at the time of suit were not based upon any hourly rates (R. 145–147).

The salary due each employee under the computation set forth in the Court's opinion is approximately $195 per month.[4] When the Administrator instituted suit in September 1944, Stegman received a monthly salary of $205; Spooner and Page received monthly salaries of $210 plus overtime compensation at straight time rates for all hours worked over 46 per week (R. 145–147). Obviously, the hourly rate of 80 cents referred to in the opinion was not employed to compute these salaries and the record is utterly devoid of any suggestion that any other hourly rate was employed as a basis for computing straight time and overtime compensation in order to arrive at the agreed salary. In such circumstances the courts have unanimously refused to imply a rate which would satisfy the statutory requirements. "Implication cannot mend a contract so deficient in complying with the law." Overnight Motor Co. v. Missel, 316 U. S. 572, 581; Yellow Truck & Coach Mfg. Co. v. Edmondson, No. 10,133, C. C. A. 6, decided May 13, 1946, pp. 3–4. Or, as stated by Mr. Justice Frankfurter, concurring in Walling v. Harnischfeger Corp., 325 U. S. 427, 434: "It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute."

Squarely in point is Seneca Coal & Coke Co. v. Lofton, 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772. There, as here, the employer "believed in good faith that it [the Act] did not cover the employment, but if covered, the employment contract was in compliance therewith" (p. 363). The employer "contended that since the agreed monthly salary was intended to compensate the employee in full for * * * the agreed hours, * * * the contract by necessary implication provided compensation for a statutory workweek and compensation for the agreed overtime, on a basis of one and one-half times the regular rates" (p. 362). In answering this argument the court stated: "It is now settled beyond dispute that where a 'regular rate' is not expressly

[3] As far as the record shows, Stegman had always been employed on a salary basis and never was employed at an hourly rate (R. 147). Although the other engineers had their pay changed from an hourly rate to a monthly salary on February 1, 1941, Stegman's salary remained unchanged from November 1939 to March 1942 (R. 147). During this period the statutory workweek after which overtime compensation had to be paid changed from 42 to 40 hours.

[4] Under the facts stated in the Court's opinion (p. 7), the monthly salary should have been $195.87 on February 1, 1941. (80 cents an hour for 40 hours plus $1.20 for 11 hours = $45.20 per week, times 52 = $2,350.40 per year, divided by 12 = $195.87 per month.) At the time, as the record shows (R. 145–147), Page was paid $185, Spooner $180, and Stegman (who had never been on an hourly basis) $190.

provided in the employment contract, * * * the court will not supply the deficiency by implication" (p. 362). Thus, whatever may have been the situation when the transposition from hourly rate to monthly salary was first effected, the subsequent raises in salary without any reference to hourly rates demonstrate that appellee was not in compliance when this action was instituted.[5] The additional compensation cannot be attributed to overtime without specific agreement. Walling v. Harnischfeger Corp., supra.

Moreover, the overtime compensation paid in addition to the salary, for hours in excess of 46, demonstrates that the salaries in effect at the time of suit did not include overtime compensation. The trial court found (R. 146–147) that two of the engineers received "straight-time overtime pay for hours worked in excess of 46 hours per week up to a maximum of 53 hours per week." In order to compute the "straight-time overtime" owing, the salary was converted into an hourly rate by dividing the weekly wage by the number of hours for which it was paid (46 hours at the time of suit).[6] This is precisely the method of computing the regular rate employed by the Administrator. See Interpretative Bulletin No. 4, par. 10.[7] The only overtime compensation reflected in appellee's pay records is the straight-time overtime. Plaintiff's Exhibit 3. Thus it is clear that the salary provided compensation at the regular rate for hours up to 46, that the overtime arrangement provided compensation at the same rate for hours in excess of 46, and that overtime at the statutory rate of one and one-half times the regular rate was not paid for any of the hours worked in excess of 40. The contention of appellee that the salary included overtime compensation is thus conclusively refuted. But even if the salary did include overtime compensation for the hours up to 46, there is no color of compliance for the hours over 46 for which admittedly only straight time was paid (R. 117, 118, 120, 129, 146–147).

We have shown, we believe, that the salaries paid the engineers did not include overtime compensation in conformity with the Act at the time suit was instituted because (1) no regular rate

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[5] As this Court recently stated in Yellow Truck & Coach Manufacturing Co. v. Edmondson, No. 10,133, decided May 13, 1946: "A court will not redraft a wage contract merely upon a presumption that the contracting parties contemplated compliance with law" (p. 3).

[6] The two engineers at this time received a salary of $210 per month (R. 146–147) or $48.46 per week. During this period an overtime rate of $1.054 per hour was employed. It is readily apparent that this overtime rate was computed by dividing the weekly rate, $48.46, by 46 hours. The overtime rate of $1.054 per hour was then paid for five hours each week (the difference between 51 and 46) and for four weeks each month. This explains the monthly entry on appellee's records of $21.08 for overtime. See Plaintiff's Exhibit 3 and Defendant's Exhibits M and N on file with the Court (R. 158). The straight time rate employed by appellee was not the rate (80 cents) employed in the Court's opinion nor a rate which at time and one-half for hours over 40 would equal the salary paid.

[7] This paragraph is printed in the Appendix.

was agreed upon or employed in computing the salary and (2) the payment of overtime at straight-time rates refutes the use of any other rate. We submit, further, that even in February 1941 when two of the engineers were first put on a salary basis, the salaries did not include overtime. As pointed out in note 4, supra, the salary then payable, based on the theory and figures employed by the Court, was $195.87 per month. The salaries actually paid were $180 (Spooner) and $185 (Page). The only explanation for this discrepancy is that the salaries did not purport to be based upon any regular and overtime rates but merely took into consideration previous rates as one of many factors in the negotiations (R. 100–101).[*] This is borne out by appellee's own witness who testified that the monthly salary was a mere approximation, not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in (R. 100–101). The same witness admitted that the employment contracts did not provide a fixed hourly rate because "the company was going on the premise * * * that these men were * * * exempt employees * * * and that under the law they were not entitled to time and a half" (R. 101). Thus the salaries paid on February 1, 1941, when Page and Spooner were placed on a salary basis, did not conform to the requirements of the Act because they were not based on any rates on which overtime was computed.

Accordingly, we respectfully request the Court to amend its opinion to hold that appellee was not in compliance with the Act with respect to Stegman, who had never been employed on an hourly rate, and with respect to Page and Spooner, whose salaries bore no relation to any hourly rate ever agreed to by the parties, and whose extra "straight-time for overtime" was paid at an hourly rate which is consistent only with the theory that their salaries included no overtime.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,
MORTON LIFTIN,
Assistant Solicitor,
AARON A. CAGHAN,
Regional Attorney,
FREDERICK U. REEL,
Attorney,
United States Department of Labor.

JUNE 1946.

[*] The raise to $195 in August 1941 was not for the purpose of mathematically adjusting the salary to meet the requirements of the old hourly rates but was the result of negotiations with the union (R. 103, 108).

CERTIFICATE

I certify that the petition for rehearing is presented in good faith and not for purposes of delay.

MORTON LIFTIN,
Assistant Solicitor,
United States Department of Labor.

APPENDIX

Interpretative Bulletin No. 4:

"10. If the employee is on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the regular number of hours worked or if no regular number of hours is worked, by the total number of hours worked each week. If the employee works a regular number of hours, the regular hourly rate of pay will be a fixed rate, remaining unchanged from week to week. But if the employee works a fluctuating and not a regular number of hours, his regular hourly rate of pay will be the average hourly rate for the week and will vary from week to week. If the employee is on a monthly salary basis, the monthly salary is subject to translation into its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary will be translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at the regular hourly rate of pay will be calculated as indicated above."

Order denying rehearing

Filed July 8, 1946

The petition for rehearing is denied.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of L. Metcalfe Walling, Admr. of the Wage & Hour Division, U. S. Dept. of Labor vs. The General Industries Company, No. 10078, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 6th day of September A. D. 1946.

(S) J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Supreme Court of the United States

No. 564, October Term, 1946

Order allowing certiorari

(Filed November 12, 1946)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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OCT 3 1946
CHARLES ELMORE CROPLEY
CLERK

No. 564

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Sec. 7 (a) — 2

715495—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 564

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above case on May 28, 1946, and that the judgment be reversed.

OPINIONS BELOW

The opinion of the District Court (R. 137–141) is reported at 60 F. Supp. 549. The opinion of the Circuit Court of Appeals (R. 159–164) is reported at 155 F. 2d 711.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 28, 1946. A petition for re-

hearing was filed on June 17, 1946 (R. 165–174), and denied on July 8, 1946 (R. 176). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The employees in this case received flat monthly salaries under contracts of employment which did not specify regular or hourly rates of pay. One of the employees had always been paid on a salary basis; the others had formerly been paid on an hourly basis. In the negotiations concerning the amount of the salary, consideration was given, *inter alia,* to the hourly rates previously paid. The question is whether the court below was justified in holding, notwithstanding the ruling of this Court in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, that Section 7 of the Fair Labor Standards Act did not require that the employees receive compensation in addition to their salaries for hours worked in excess of the statutory maximum.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *

> (3) for a workweek longer than forty hours * * *
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Respondent, an Ohio corporation, is engaged in the manufacture of metal and plastic products, substantially all of which are regularly distributed in interstate commerce (R. 141). Respondent generated its own power and employed three operating engineers, in addition to a chief engineer, to man the power plant (R. 137). This petition relates to the three operating engineers whose duties included maintaining the machinery in proper operation by packing, wiping, oiling, making emergency repairs and minor adjustments, reading gauges and listening for sounds of disorder (R. 149). The Administrator's complaint alleged violations of the overtime provisions of the Act with respect to these employees (R. 5–7, 10). Respondent answered that its covered employees who did not receive overtime compensation in accordance with the requirements of the Act were exempt as executive or administrative employees under Section 13 (a) (1) and the Administrator's regulations (R. 20, 23, 102). The Administrator's regulations require an employee to be compensated for his services "on a salary

basis" in order to qualify for exemption as an executive (R. 134). The district court found that the three engineers were employed as executives and therefore exempt from the provisions of the Act (R. 152). On appeal, it was held that the findings underlying this conclusion of the district court were not sustained by the evidence (R. 162). The denial of an injunction was affirmed, however, on the ground that the employees were compensated for overtime employment in accordance with the requirements of the Act (R. 164).

The district court found that all three engineers were "compensated on a salary basis" (R. 145–147). The district court made no finding and the record contains no evidence that the contract of employment specified any regular or overtime hourly rate of pay. The only written agreement in the record, signed by the three engineers on July 25, 1944, makes no reference to any basis of compensation except the monthly salary. It provides (R. 151):

> We the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges *and continue on a salary basis.* [Italics supplied.]

Respondent's witnesses testified that the employment contracts did not provide a fixed hourly rate because "the company was going on the premise, which we are still going on, that these men were what you call exempt employees, they were super-

visory employees, and that under the law they were not entitled to time and a half" (R. 101).

One of the engineers (Stegman) apparently had always been paid on a salary basis and received no additional compensation for overtime hours (R. 147, 66, 67). The two other engineers (Page and Spooner) had been paid on an hourly basis until February 1941 when they were placed on a monthly salary (R. 145–147, 99, 100, 107). With respect to each of these two engineers, the district court found that at the time of suit he "received no compensation for overtime in addition to his salary" except "straight-time overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week" (R. 145–147).[1] The engineers had a normal workweek of 51 hours, but the hours actually worked sometimes varied from 42 to 59½ (R. 45, 120, 128, Exs. M, N). The straight-time rates were computed by reducing the monthly salary to its weekly equivalent and dividing the weekly wage by 46 (Exs. 3, M, N).[2]

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[1] This arrangement was in effect from December 15, 1943, to December 31, 1944. For the period from June 1, 1943, to December 15, 1943, straight-time overtime was paid for hours worked in excess of 49. Between February 1941 and June 1943 only the salary was paid (R. 145–147). The exhibits referred to are on file with the court.

[2] The monthly salary, $210, multiplied by 12 and divided by 52, is $48.46 per week. This amount, divided by 46, is $1.054 per hour. This rate was paid for five hours each week (the difference between 51 and 46) and for four weeks each month. This explains the monthly entry on appellee's records of $21.08 for overtime.

Prior to the time Page and Spooner were placed on a salary basis, negotiations were conducted to fix the amount of the salary. The district court found that as a result of these negotiations it was agreed "that they would be compensated on a monthly salary basis" in an amount sufficient to provide for the regular and overtime compensation previously paid them at their regular hourly rate of 80 cents per hour (R. 150). The salaries did not purport to incorporate any regular and overtime rates but merely took into consideration hourly rates previously paid as one of many factors in the negotiations (R. 100–101). Thus one of respondent's witnesses testified that the monthly salary was a mere approximation, not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101). That the salary actually agreed upon did not purport to embody an hourly rate is implicit in the district court's finding that the amount of the salary was more than the employees would have earned at their hourly rate (R. 150).[3]

In February 1941 when Page and Spooner were first put on a salary basis, their monthly salaries were $185 and $180, respectively, Stegman's was $190. When this suit was instituted the salaries

[3] Actual computation will demonstrate that the salary was in fact less. See note 8, *infra*. The significance of the finding, however, lies in its recognition that there was not an exact translation of the hourly rates into the salary.

of Page and Spooner had been increased to $210 per month, Stegman's to $205 per month (R. 145–147). Although the record indicates that the hourly rate of 80 cents was one of the factors in negotiating the original salaries of Page and Spooner, there is no suggestion in the record that any hourly rate was considered in connection with their subsequent salary increases or in connection with determining Stegman's salary at any time.

The circuit court of appeals held that respondent had not violated the overtime requirements of the Act. Its ruling was based upon the hypothesis, for which it found support in the evidence summarized above, that the monthly salaries of the engineers included compensation at 80 cents an hour for 40 hours and at one and one-half times that rate for hours worked in excess of 40 for a scheduled workweek of 51 hours (R. 164).

REASONS FOR GRANTING THE WRIT

The holding of the court below that a salary could be interpreted to include overtime compensation, notwithstanding the failure of the contract to provide hourly or overtime rates, is in direct conflict with this Court's decisions in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, and *Floyd* v. *DuBois Soap Co.*, 317 U. S. 596, and should, we submit, be reversed on the authority of those cases. In the *Missel* case this Court held that an employee who received a weekly salary for a variable number of hours in excess of the statutory

maximum had not received overtime compensation under the Act. In the *Floyd* case the same conclusion was reached with respect to employees who worked a fixed rather than a variable number of hours. These decisions require the same result in the instant case where respondent's employees were paid a salary for hours in excess of the statutory maximum without receiving additional compensation for overtime hours.

In finding compliance with the overtime requirements of the Act, notwithstanding respondent's admission that it was proceeding on the premise that the engineers were not entitled to overtime compensation (R. 101), the court below assumed that the salary was calculated to include an allowance for statutory overtime based upon the prior 80-cent hourly rate (R. 164). We shall show that this asumption cannot be squared with either the findings of the district court or the record. But even if the salary were so calculated, the decision is nevertheless inconsistent with *Overnight Motor Co. v. Missel, supra.* Other circuit courts of appeals have relied upon the *Missel* case in consistently holding that, notwithstanding an intention to have the salary include overtime compensation, a contract for a workweek longer than the statutory maximum, which does not specify hourly rates, violates the overtime requirements of the Act. *Walling* v. *Stone,* 131 F. 2d 461, 463 (C. C. A. 7); *Walling* v. *Helmerich &*

Payne, 138 F. 2d 705, 707 (C. C. A. 10);[4] *Patsy Oil & Gas Co.* v. *Roberts,* 132 F. 2d 826 (C. C. A. 10); *Watkins* v. *Hudson Coal Co.,* 151 F. 2d 311 (C. C. A. 3), certiorari denied, No. 703, October Term, 1945, February 4, 1946; see also *Seneca Coal & Coke Co.* v. *Lofton,* 136 F. 2d 359, 362 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Adams* v. *Union Dime Savings Bank,* 144 F. 2d 290 (C. C. A. 2), certiorari denied, 323 U. S. 751. The specification of hourly rates in the contract involved in *Walling* v. *Belo Corp.,* 316 U. S. 624, was expressly referred to in *Overnight Motor Co.* v. *Missel, supra,* at 581, as distinguishing the two cases.[5] It is clear, therefore, that the *Missel* rule must govern where the contract provides only for a salary.

The contracts here not only failed to specify an hourly rate, but could not have been based upon the rate which the court below assumed was employed. The court of appeals stated that "the pay was figured in a shift from hourly pay to monthly salary, at 80 cents an hour" (R. 164). But at the time of the shift to salaries in February 1941 each of the three engineers was paid a

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[4] This issue was not before this Court in its review of the case, 323 U. S. 37, as the circuit court of appeals decided this aspect of the case favorably to the Administrator, and the Company did not seek review.

[5] Accordingly, the decision below is erroneous under the doctrine of the *Missel* case, regardless of the outcome of *Walling* v. *Halliburton Oil Co.,* No. 74, this Term, in which the present vitality of the *Belo* decision is involved.

different monthly salary.[6] Since the court below assumed the same workweek for all employees, the same hourly rate could not have been used to arrive at three different salaries. Moreover, Stegman was paid on a salary basis at the time of the "shift" and has been so paid at least since 1939.[7] Thus the hypothesis of the court's ruling could in no event be acceptable as applied to Stegman. And its applicability to the other two engineers is also difficult to reconcile with the undisputed evidence in the record as to how their salaries were fixed. Respondent's own witness testified that the monthly salary was not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101). The monthly salary payable, based on the theory and figures employed by the Circuit Court of Appeals, would have been $195.87.[8] The salaries actually paid were $180 (Spooner) and $185 (Page).[9] Moreover, an

[6] Page received $185; Spooner, $180; and Stegman, $190 (R. 145–147).

[7] Although the other engineers had their pay changed from an hourly rate to a monthly salary on February 1, 1941, Stegman's salary remained unchanged from November 1939 to March 1942 (R. 147). During this period the statutory workweek after which overtime compensation had to be paid changed from 42 to 40 hours.

[8] ($0.80×40 hours) + $1.20×11 hours) = $45.20 per week ($45.20×52 weeks) ÷ 12 months = $195.87 per month.

[9] A raise to $195 in August 1941 was not for the purpose of mathematically adjusting the salary to meet the requirements of the old hourly rates but was the result of negotiations with the union (R. 103, 108).

intention to fix the salaries so as to comply with the Act is doubtful because the company admittedly was going on the premise that the engineers were "exempt employees * * * and that under the law they were not entitled to time and a half" (R. 101). Thus, it is clear that at the time referred to in the opinion of the court below the contract of employment was based upon a salary alone without provision for overtime compensation. The case would seem, therefore, to be clearly governed by *Overnight Motor Co.* v. *Missel, supra,* where the Court's opinion stressed the fact that "there was no contractual limit upon the hours which petitioner [the employer] could have required respondent [the employee] to work for the agreed wage * * * and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage" (p. 581). As the Court stated, "Implication cannot mend a contract so deficient in complying with the law" (p. 581).

Moreover, the salaries paid *at the time of suit* were completely unrelated to the rate adopted by the court below. The district court found that Stegman was paid a salary and that Page and Spooner received salaries with "no compensation for overtime in addition to his salary" except overtime at straight-time rates for hours worked in excess of 46 per week (R. 145–147). At the time of suit two engineers were paid salaries of $210 per month and one $205 (R. 145–147). Application of the hourly rate of 80 cents

assumed by the court would have equalled $195.87 per month on the basis of a 51-hour week[10] and $169.87 per month on the basis of a 46-hour week.[11] The discrepancy between these amounts and the salaries of $210 and $205 actually paid is the clearest evidence that the salaries did not purport to be predicated upon the assumed hourly rate. In the absence of a specific contract provision, this discrepancy obviously cannot be allocated to overtime. *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. As succinctly stated in the concurring opinion of Mr. Justice Frankfurter: "It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute" (p. 434.[12]

The record not only fails to disclose any rate upon which a theory of compliance with the Act's overtime requirements may be premised, but, on the contrary, affirmatively establishes that no such rate was employed. As we have seen, the district court found that at the time of suit two engineers received salaries and "straight-time

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[10] See note 8, supra.

[11] ($0.80×40 hours) + ($1.20×6 hours) = $39.20 per week ($39.20×52 weeks) ÷ 12 months = $169.87 per month.

[12] Since it is clear that the 80-cent rate was not in fact employed in determining the employees' compensation, it should be pointed out that it would not establish the regular rate even if actually specified. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419.

overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week" (R. 146–147). The straight-time rates were obtained by dividing the weekly salary by 46.[13] This finding of salary and overtime rates in the absence of other pertinent findings clearly implies that other rates were not employed. Thus, it must be assumed that the salary provided compensation at the regular rate for hours up to 46, that the overtime arrangement provided compensation at the same rate for hours in excess of 46, and that overtime at the statutory rate of one and one-half times the regular rate was not paid for any of the hours worked in excess of 40. The "hypothetical mathematical interpretation" that the salary included overtime compensation does not correspond, therefore, to the actual arrangement evidenced by the record. And even if the salary did include overtime compensation for the hours up to 46, there is no color of compliance for the hours over 46 for which admittedly only straight time was paid (R. 117, 118, 120, 129, 146–147).

CONCLUSION

If the decision below should stand, the opportunities for evasion of the overtime pay provisions of the Fair Labor Standards Act would be immeasurably enlarged. In view of the importance of vacating so clearly erroneous a precedent,

[13] See note 2, *supra*.

as well as the plain conflict with the decisions of this Court in the *Missel* and *Floyd* cases, it is respectfully submitted that this petition be granted and the judgment of the court below be reversed without further argument on the merits. It may be noted that a similar procedure was followed in the *Floyd* case; 317 U. S. 596.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
Solicitor,
United States Department of Labor.

OCTOBER 1946.

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No. 564

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 137–141) is reported at 60 F. Supp. 549. The opinion of the Circuit Court of Appeals (R. 159–164) is reported at 155 F. 2d 711.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 28, 1946 (R. 159). A petition for rehearing was filed on June 17, 1946 (R. 165–169), and denied on July 8, 1946 (R. 169). The

petition for a writ of certiorari was filed on October 3, 1946, and granted on November 12, 1946 (R. 170). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The employees in this case received flat monthly salaries under contracts of employment which did not specify regular or hourly rates of pay. One of the employees had always been paid on a salary basis; the remaining two had previously been paid on an hourly basis. In the negotiations concerning the amounts of the salaries, consideration was given, *inter alia,* to the hourly rates previously paid. The question presented is whether respondent's failure to pay the employees compensation in addition to their salaries for hours worked in excess of the statutory maximum violates Section 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *

(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

STATEMENT

Respondent, an Ohio corporation, was engaged in the manufacture of metal and plastic products, substantially all of which were regularly distributed in interstate commerce (R. 5, 20). Respondent generated its own power and employed three operating engineers, in addition to a chief engineer, to man the power plant (R. 137, 149). This case relates to the three operating engineers whose duties included maintaining the machinery in proper operation by packing, wiping, oiling, making emergency repairs and minor adjustments, reading gauges, listening for sounds of disorder, and reporting to their immediate superior any breakdown for which they were unable to provide (R. 149).

The Administrator's complaint alleged violations of the overtime provisions of the Act with respect to these employees (R. 5–7, 10). Respondent answered that its covered employees who did not receive overtime compensation in accordance with the requirements of the Act were exempt as executive or administrative employees under Section 13 (a) (1) and the Administra-

tor's regulations (R. 20–21). The Administrator's regulations provide, among other requirements, that an employe must be compensated "on a salary basis" to qualify for the exemption (R. 134).[1] The district court concluded that the three engineers were employed as executives and therefore exempt from the provisions of the Act (R. 152). On appeal, it was held that the engineers were not exempt because the findings of the district court, that they directed the work of other employees and customarily exercised discretionary powers (R. 149–150), were not sustained by the evidence (R. 162). The denial of an injunction was affirmed, however, on the ground that the employees were compensated for overtime employment in accordance with the requirements of the Act (R. 164).

The district court found that all three engineers were "compensated on a salary basis" (R. 145, 146, 147). One of them, Stegman, apparently had always been paid on that basis (R. 147, 67).[2] The two other engineers, Page and Spooner, had been paid an hourly rate of 80 cents an hour until February 1941 when they were placed on a month-

[1] Payment "on a salary basis" is necessary to qualify an employee for exemption as an "executive." An "administrative" employee, to qualify for an exemption, must be paid "on a salary or fee basis" (R. 134).

[2] Stegman had been the chief engineer but relinquished that position for health reasons (R. 64).

ly salary[3] (R. 145–147, 95, 99–100, 107). Prior to the time Page and Spooner were placed on a salary basis, negotiations were conducted to reduce their hours[4] and to fix the amount of the salary. The district court found that as a result of these negotiations it was agreed "that they [the engineers] would be compensated on a monthly salary basis, sufficient in amount to compensate them under the Fair Labor Standards Act for regular and overtime employment at the regular hourly rate of pay they were receiving prior to February 1, 1941" (R. 150). The salaries, however, were not based on and did not purport to incorporate any regular and overtime rates but merely took into consideration the hourly rate previously paid as one of many factors in the negotiations (R. 100–101). When the salary rate was negotiated, respondent admittedly "took the engineers off of the hourly rate" (R. 95). The monthly salary was a mere approximation, not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101). The salaries actually agreed upon and paid were less than the em-

[3] The district court found that the change took place on February 1, 1941 (R. 150), but the collective bargaining agreement, on the basis of which the change went into effect (R. 95), was entered into on March 10, 1941 (Ex. J).

[4] According to the testimony of respondent's counsel, these two engineers "had been working an average of about 56½ or 57 hours per week" (R. 95).

ployees would have earned if they had been based on the 80-cent hourly rate for a 51-hour week.[6] On the basis of 80 cents an hour for 40 hours and $1.20 per hour for 11 hours the monthly salary would have been $195.87,[6] as contrasted with the $185.00 paid Page, the $180.00 paid Spooner, and the $190.00 paid Stegman.[7]

[5] The salaries were subsequently increased. The various salaries paid to the three engineers were as follows (R. 145–147):

	Feb. 1, 1941–Apr. 1, 1941	Apr. 1, 1941–Aug. 1, 1941	Aug. 1, 1941–Mar. 10, 1942	Mar. 10, 1943–Dec. 31, 1944
Stegman	$190.00	$190.00	$190.00	$205.00
Page	185.00	185.00	195.00	210.00
Spooner	180.00	185.00	195.00	210.00

The scheduled workweek of Page and Spooner was 51 hours (R. 41, 45, 56, 95) but respondent's payroll records (Exs. 4, 5, M, N) show that they occasionally worked as few as 33½ hours and sometimes as many as 59½ hours a week (R. 120, 128). Stegman apparently worked shorter hours than the other two operating engineers (R. 65).

[6] The compensation may be shown as follows:
($0.80×40 hours) + ($1.20×11 hours)=$45.20 per week;
(45.20×52 weeks)÷12 months=$195.87.

[7] The district court's finding that the amount of the salary was "more than the amount which they [the engineers] would have earned at the regular hourly rate of Eighty Cents (80c) per hour paid prior to February 1, 1941, plus overtime pay under the Fair Labor Standards Act at the rate of time and one-half the regular hourly rate of pay for the scheduled work week of fifty-one (51) hours per week" (R. 150) is erroneous. Nevertheless, implicit in the finding is the district court's recognition that there was not an actual translation of the old hourly rates into the newly fixed salaries.

A more plausible explanation of the amounts paid to Page and Spooner is that they were based on a straight rate of 83

In 1944, shortly after respondent's plant was inspected by representatives of the Wage and Hour Division and the executive exemption issue was raised (R. 9–15), the engineers were asked whether they "wanted to go back on the hourly basis or still stay on the salary" (R. 54).[5] They elected the latter and on July 25, 1944, signed an agreement which provided (R. 151):

> We the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges *and continue on a salary basis.* [Italics supplied.]

Respondent's witnesses testified that the employment contracts did not provide a fixed hourly rate because "the company was going on the premise, which we are still going on, that these men were what you call exempt employees, they were supervisory employees, and that under the law they were not entitled to time and a half" (R. 101).

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cents an hour for a 51-hour week. The agreement entered into on March 10, 1941 (Ex. J), provided a 3 cent hourly increase for respondent's employees which, added to the hourly rates the two engineers were then receiving, would have given them an hourly rate of 83 cents. This rate multiplied by 51 scheduled hours results in a weekly salary of $42.33 which is equivalent to a monthly salary of $183.43 ($42.33 per week × 52 weeks = $2201.16 per annum ÷ 12 months = $183.43 per month). The latter sum is closer to the $185.00 given to Page and the $180.00 paid to Spooner than the sum of $195.87.

[5] At the time of the inspection respondent furnished to representatives of the Division a list of its employees claimed to be exempt from the Act (R. 24–25). This document classifies Page and Spooner as "employees receiving additional straight time" for 48–53 hours a week, and lists Stegman under the heading "no overtime" (Ex. 1).

None of the employees in question was ever paid compensation for overtime in addition to his salary except that, during the period from June 1, 1943, to December 15, 1943, Page and Spooner received "straight-time overtime pay for hours worked in excess of 49 hours per week, up to a maximum of 53 hours per week" and from December 15, 1943, to December 31, 1944, for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week (R. 146, 147).[9] The straight-time rates for the latter period were computed by reducing the monthly salary to its weekly equivalent and dividing the weekly wage by 46.[10]

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[9] The avowed purpose of these straight-time payments was to increase the employees' salaries which were then limited by the wage stabilization regulations. The district court found that the payments were made "pursuant to express approval from the Salary Stabilization Unit of the United States Treasury Department under the wage stabilization provisions of the Emergency Price Control Act of 1942, based on a finding by the Salary Stabilization Unit that it was permissible for the defendant to pay such straight-time overtime as a salary increase for an exempt employee under the Fair Labor Standards Act" (R. 146–147). The Treasury Department, of course, did not purport to rule, on the applicability of the Section 13 (a) (1) exemption to these engineers.

[10] The "straight-time rate" appearing on respondents' payroll records for 1944 (Exs. 4, 5, M, N) is $1.054. This amount equals exactly the monthly salary ($210.00), multiplied by 12 (months), divided by 52 (weeks), and divided by 46: $\frac{210\times 12}{52\times 46}=1.054$

The district court made no finding and the record contains no evidence that any hourly rate was ever agreed upon or otherwise specified, either orally or in writing, during the period in question, other than the "straight-time rate" for hours in excess of 49 and later 46. The latter rate is the only hourly rate appearing on the payroll records introduced by respondent at the trial (Exs. M, N). The individual engineers testified that they had never been told that their salaries included overtime (Page, R. 46; Spooner, R. 57; Stegman, R. 66), or were made up of any hourly rate (Page, R. 46; Spooner, R. 57).

The circuit court of appeals held that "appellee has compensated its non-exempt employees for overtime employment in accordance with the requirements of the Act" (R. 164). It based this conclusion on the ground that the monthly salaries were "figured in a shift from hourly pay to monthly salary, at 80 cents an hour, which was the amount they [the engineers] would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled work-week of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time

their salary includes an allowance of one-and-one-half pay for overtime" (R. 164).

SPECIFICATION OF ERRORS

The court below erred

1. In holding that the monthly salaries paid by respondent to its operating engineers included overtime compensation in accordance with the requirements of Section 7 of the Fair Labor Standards Act.

2. In treating the 80-cent hourly rate, paid to two of the engineers before the shift to a salary basis, as their "regular rate of pay" within Section 7, even though this rate was not specified or agreed upon by the parties and was not in fact used to determine the engineers' compensation.

3. In affirming the judgment of the District Court which denied petitioner's prayer for an injunction.

ARGUMENT

RESPONDENT DID NOT PAY ITS OPERATING ENGINEERS THE OVERTIME COMPENSATION REQUIRED BY THE ACT

In holding that respondent has compensated its operating engineers in accordance with Section 7 of the Fair Labor Standards Act, the court below regarded their monthly salaries as including overtime compensation on the basis of a "regular rate" of 80 cents an hour which was the hourly rate paid to two of the engineers prior to the "shift from hourly pay to monthly

salary" (R. 164). The decisions of this Court unequivocally establish that the amount of wages paid and the method of compensation actually employed determine the "regular rate" for purposes of Section 7. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419. It is clear in the instant case that the monthly salaries agreed upon and actually paid the engineers in fact determined their compensation for their basic workweek of 51 hours.[11] The 80-cent hourly rate used by the court below to support its conclusion that overtime compensation was paid (1) was not agreed upon by the parties or specified in their contracts (*Missel* case, *supra*), and (2), in any event, did not in fact determine and was never used in calculatig the employees' compensation "for the normal, non-overtime workweek." *Youngerman-Reynolds* case, *supra* at 424; *Harnischfeger* case, *supra*.. It follows, therefore, that the monthly salaries should have been used to ascertain the regular rate in accordance with the formula adopted by this Court in the *Missel* case, and that the court below disregarded well established principles in holding otherwise.

[11] As we have shown, *supra*, p. 8, the monthly salaries were subsequently paid for workweeks of 49 and then 46 hours.

1. THE 80-CENT HOURLY RATE WAS NOT SPECIFIED OR AGREED UPON BY THE PARTIES AS THE "REGULAR RATE"

The holding of the court below that a salary may be interpreted to include overtime compensation, even in the absence of specification of hourly or overtime rates by the parties, is in conflict with the *Missel* and other decisions of this Court under Section 7. In the *Missel* case, this Court held that payment of a salary for a variable number of hours in excess of the statutory maximum, without additional compensation for overtime hours, did not comply with Section 7.[12] The "weekly guaranty" plan in *Walling* v. *Belo Corp.*, 316 U. S. 624, was upheld as a contract which "specifies a basic hourly rate of pay" (p. 634). The *Missel* case was distinguished on the ground that "in the contract in that case, there is no stated hourly wage and no provision for overtime" (*Belo* case, p. 634). See also *Missel* opinion, at p. 581. The contract in the instant case, therefore, which provided only for a salary, is clearly governed by the *Missel* rule.

At the time respondent's plant was inspected, it expressly recognized that the three engineers were paid "on a salary basis" (R. 151) and were not being paid additional compensation for statutory overtime (Ex. 1 discussed in note 8, *supra*).

[12] During the following term this Court applied the *Missel* rule to employees working a *fixed* number of hours. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Floyd* v. *DuBois Soap Co.*, 317 U. S. 596.

Although the 80-cent hourly rate, previously paid to Page and Spooner, was apparently one of the factors considered in negotiating their salaries early in 1941, there is no evidence in the record that this rate or any other hourly rate was specified by the parties in the employment agreement or agreed upon either orally[13] or in writing. On the contrary, the uncontradicted testimony of the engineers is that they were never advised that their monthly salaries included overtime compensation or were "made up of any hourly rate" (R. 46, 57). Although respondent's attorney testified that the monthly salary negotiated in February 1941, "contemplated regular time pay and regular overtime for the work which was agreed on at that time" (R. 97), he further testified that when the salary was negotiated for the engineers, "we took the engineers off of the hourly rate" (R. 95) and that a fixed hourly rate was not provided because "the company was going on the premise, which we are still going on, that these men were what you call exempt employees * * * and that under the law they were not entitled to time and a half" (R. 101).

The foregoing indicates that, even when the engineers were originally placed on a salary basis,

[13] Respondent's assumption that the Administrator bases his case on the fact that "the contract between the Respondent and its engineers governing their hourly rate of pay was not in writing" (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 6) misconceives the Administrator's position.

the 80-cent hourly rate assumed by the court below was not a part of their contract. There can be no doubt that the 80-cent rate was not a part of their contract at the time this action was instituted more than three years later after their salaries were substantially increased. Although there is evidence that the hourly rate in effect at the time of the shift to a salary was one of the factors in arriving at the amount of the salary, there is not the slightest suggestion in the record that the increased salaries being paid at the time of suit were based upon any hourly rates. In fact, it is clear from the application of an agreement negotiated between respondent and the union representing its employees that the engineers were regarded as salaried and not hourly rate employees (Ex. J). This agreement provided for a 10-cent per hour increase for hourly rate employees and for an "increase in pay of fifteen dollars ($15.00) per month effective retroactive to March 10, 1942" for "each salaried employee". The record shows that the engineers received the $15 monthly increase as of March 10, 1942 (R. 145–147). Obviously it is not the function of the courts to allocate this or the other salary increases paid the engineers to regular time and overtime. *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. As stated in the concurring opinion of Mr. Justice Frankfurter: "It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corre-

sponded with the actual arrangement, could satisfy the statute" (p. 434). That the salary alone was considered the basis of the engineers' compensation is further evidenced by the fact that, when the application of the exemption was first placed in issue by Government representatives, respondent proceeded to obtain a written agreement from the engineers "to be regarded as Foremen * * * and continue on a salary basis" rather than return to an hourly rate (R. 54, 151).

Since it is clear that the only element of compensation agreed upon was the salary, respondent can claim at most that there was a general intent, without specification of rates, to have the salary include overtime. Even this is doubtful in view of respondent's admission that it assumed the engineers were exempt employees who were not entitled to overtime compensation (R. 101). As already indicated, in the absence of specified hourly and overtime rates, an agreement for a straight monthly salary will not be construed to include overtime pay. *Overnight Motor Co.* v. *Missel, supra; Warren-Bradshaw Drilling Co.* v. *Hall, supra; Floyd* v. *Du Bois Soap Co., supra.* Even where an intention to have the compensation paid include overtime has been made clear by the specification in the contract of regular and overtime rates, this Court has held that the daily wage or a piece rate, in fact employed, did not include overtime. *Walling* v. *Helmerich & Payne, supra; Walling* v. *Harnischfeger Corp., supra;*

Walling v. *Youngerman-Reynolds Hardwood Co.*, *supra*. The circuit courts of appeals have consistently interpreted the *Missel* decision as holding that, notwithstanding an intention to have the salary include overtime compensation, a contract for a work-week longer than the statutory maximum, which does not specify hourly rates, violates the overtime requirements of the Act. *Walling* v. *Stone*, 131 F. 2d 461, 463 (C. C. A. 7); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359, 362 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. 2d 826 (C. C. A. 10); *Walling* v. *Helmerich & Payne*, 138 F. 2d 705, 707 (C. C. A. 10);[14] *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3), certiorari denied, 327 U. S. 777; see also *Adams* v. *Union Dime Savings Bank*, 144 F. 2d 290 (C. C. A. 2), certiorari denied, 323 U. S. 751. In *Walling* v. *Stone*, *supra*, at 463, "the court found that the defendants and their employees intended that the fixed weekly rates of compensation cover regular and overtime work." The Circuit Court of Appeals said that "Even so, that alone would not be sufficient to comply with the Act; such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate, *Missel* case, *supra*" (p. 463). The court in the *Seneca Coal* case stated that even if

[14] This issue was not before this Court in its review of the case, 323 U. S. 37, as the circuit court of appeals decided this aspect of the case favorably to the Administrator, and the Company did not seek review.

"the parties believed in good faith that * * * the employment contract was in compliance" with the Act, "this belief was not based upon an express agreement concerning a regular or basic hourly rate" (at p. 363). In the absence of such an agreement, the specified salary must be regarded as the controlling element in the compensation scheme, and under the *Missel* rule the regular rate is computed by dividing the salary, reduced to a weekly basis, by the number of hours for which it was paid.

2. THE 80-CENT HOURLY RATE WAS NOT IN FACT USED IN CALCULATING THE ENGINEERS' COMPENSATION.

Not only does the record show that the 80-cent rate was not agreed upon or specified as such by the parties, but it affirmatively establishes that this rate was never in fact used to compute the engineers' compensation. Thus, even if the 80-cent rate had been specified in the contract, it should not be given effect as the regular rate for statutory purposes. *Walling* v. *Helmerich & Payne, supra; Walling* v. *Youngerman-Reynolds, supra; Walling* v. *Harnischfeger, supra.* The circuit court of appeals, in finding compliance with the overtime provisions of the Act, assumed that the salaries were "figured * * * at 80 cents an hour, which was the amount they [the engineers] would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time and one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled

workweek of 51 hours" (R. 164). As pointed out in the Statement, *supra*, a simple arithmetical calculation disproves the accuracy of this assumption. Had the salaries been calculated on the basis of 80 cents per hour for 40 hours and $1.20 an hour for 11 overtime hours, they would have been $195.87.[15] Yet Page's monthly salary was fixed at $185.00, Spooner's at $180.00, and Stegman continued to receive the $190.00 a month which he had been paid prior to that time. The very fact that each of these employees received a different salary for what the court below assumed to be the same workweek[16] indicates that the 80-cent rate was not employed in calculating the salaries. Obviously, the same rate could not have been used to arrive at three different results. The failure to translate the prior hourly rate into the salaries was indeed admitted by respondent's counsel who testified that the salaries were not "figured exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101).[17]

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[15] See *supra*, p. 6.

[16] This assumption is not supported by the record as to Stegman who apparently worked a shorter shift than the other two engineers (R. 65).

[17] Respondent suggests (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 7) that "The conversion, made in accordance with the agreement, although not originally mathematically correct was made so in August, 1941, when the Page and Spooner salaries were raised to $195 per month for the reasons stated by Mr. Glen O. Smith as follows:

"A. Well, I wouldn't want to say postively. Of course, the reason we made it $195 in August is because you add and

The district court also stated that "it is not the company's contention that if these salaries are transposed to wages and figured upon a basis of base pay plus time and a half for over time it would work out exactly. This was a figure reached in the course of bargaining" (R. 101).

The salaries paid at the time of suit were likewise wholly unrelated to the rate adopted by the court below. The district court found that Stegman was paid a salary and that Page and Spooner received salaries with "no compensation for overtime in addition to his salary" except overtime at straight-time rates for hours worked in excess of 46 per week (R. 145–147). At the time of suit the latter two engineers were paid salaries of $210 per month and Stegman, $205 (R. 145–147). Application of the hourly rate of 80 cents assumed by the court would have equalled $195.87 per month on the basis of a 51-hour week [18] and $169.87 per month on the basis of a 46-hour

subtract and multiply and get $195. The reason we made it $195 in August was because the union demanded it and got it.' (R. 103.)"

The above testimony can hardly be characterized as supporting respondent's assertion. In any event, there still remains a discrepancy between the raised salary ($195.00) and the amount arrived at on the basis of an 80-cent hourly rate ($195.87). Moreover, the $195.00 salary was paid to only two of the engineers, was in effect for only 8 out of the 47 months involved in this suit, and was not in effect at the time this action was instituted.

[18] See note 6, *supra*.

week.[19] The discrepancy between these amounts and the salaries of $210 and $205 actually paid is conclusive evidence that the salaries were not predicated upon the assumed hourly rate.

It is also evident from the compensation paid in non-standard workweeks that the 80-cent rate was never applied. Contrary to the lower court's statement that "it is not shown that any of these men ever worked more than eleven hours overtime" (R. 164), respondent's payroll records show that the engineers sometimes worked as many as 59½ hours a week. Neither during those long weeks nor during the occasional weeks when they worked 42½ or 33½ hours did their monthly compensation deviate from the agreed monthly salary except for the payment of the "straight-time overtime" for hours between 49 and 53, and later 46 and 53. Had the 80-cent rate or any other hourly rate been used to calculate the regular and overtime compensation of the engineers, the amounts paid to them would have varied in accordance with those rates when the hours deviated from the regularly scheduled workweek.

The record not only fails to disclose any rate upon which a theory of compliance with the Act's overtime requirements may be premised, but, on the contrary, affirmatively establishes that statutory overtime was not paid. As we

[19] ($0.80×40 hours)+($1.20×6 hours)=$39.20 per week
($39.20×52 weeks)÷12 months=$169.87 per month.

have seen, the only rates of compensation found by the district court to be in effect at the time of suit were the monthly salaries and "straight-time overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week" (R. 146–147).[20] And respondent's own payroll records for 1944 demonstrate that, if any hourly rate was paid to any of the engineers during that time, it was the straight-time rate of $1.054 which respondent obtained by dividing their salary by the number of hours for which it was paid. This is precisely the method which the Government contends should have been used to determine the regular rate for purposes of computing overtime compensation under Section 7 of the Act.[21] As we have

[20] Respondent attempts to explain this "straight-time overtime" as "simply a fiction resorted to by the Salary Stabilization Unit to avoid the necessity of approving basic increases which might exceed the 'Little-Steel Formula' used by the President during the war to hold wage and salary increases to a ceiling of 15% above the levels of 1941" (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 9). Whatever the reason for the adoption of this method of compensation, it was obviously inconsistent with the payment of time-and-a-half for hours in excess of the statutory workweek. That this arrangement neither provided for nor even contemplated the payment of statutory overtime compensation is made clear by the district court's finding that it was specifically approved by the Treasury "as a salary increase for an exempt employee under the Fair Labor Standards Act" (R. 146–147).

[21] This is the proper method for determining the "regular rate" where the parties agree as to the hours to be worked for the particular salary. When the agreement is for flex-

seen, however, statutory overtime was never paid on this rate.

Thus, as found by the district court and demonstrated by respondent's payroll records, the engineers were paid at the time of suit a flat salary for any number of hours up to 46, a rate officially designated "straight-time" for hours from 46 to 53, and nothing additional for the occasional work in excess of 53 hours in a workweek. At no time since the engineers were placed "on a salary basis" has their compensation been affected by any hourly rate, other than the straight-time rate for hours from 46 (or 49) to 53. The 80-cent rate, considered by the court below to have been their "regular rate of pay," was never "actually paid for the normal, non-overtime workweek" or "used as the basis for calculating the compensation received for overtime labor"; it was "not in fact the regular rate under any normal circumstances." *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* at 426. It was therefore error to consider it the regular rate for statutory purposes. *Walling* v. *Helmerich & Payne, supra; Walling* v. *Harnischfeger Corp., supra; Walling* v. *Youngerman-Reynolds Hardwood Co., supra.*

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ible hours, the regular rate is obtained by dividing the salary by the hours actually worked in each workweek and may vary from workweek to workweek, as in the *Missel* case. See Interpretative Bulletin No. 4, Wage and Hour Division, U. S. Department of Labor (November 1940), paragraphs 11–12, 1942 W. H. Man. 104, 106–107.

CONCLUSION

For the foregoing reasons the judgment of the circuit court of appeals should be reversed.

Respectfully submitted.

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No. 564

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The position taken by respondent in its brief on the merits, filed February 1, 1947, raises a question as to the scope of the issues which this Court should now undertake to consider and decide.

A brief review of the course of the litigation may be helpful. The Administrator brought suit to restrain alleged violations of the overtime provisions of the Fair Labor Standards Act with respect to three engineers employed by respondent (R. 5–7, 10). Respondent answered that these

employees were exempt as executive or administrative employees under Section 13 (a) (1) and the Administrator's regulations (R. 20, 23, 102).[1] The district court found that the engineers were employed as executives, and therefore denied an injunction (R. 152). On appeal, the court below held that this finding was not sustained by the evidence (R. 162), but affirmed the district court's decree on the ground that the employees were compensated for overtime employment in accordance with the requirements of Section 7 of the Act (R. 164).

The only question presented in the Government's petition for certiorari was "whether the court below was justified in holding, notwithstanding the ruling of this Court in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, that Section 7 of the Fair Labor Standards Act did not require that the employees receive compensation in addition to their salaries for hours worked in excess of the statutory maximum." (Pet. 2.) The respondent's brief in opposition to certiorari was similarly limited to the Section 7 issue: it urged that the decision below was correct in this regard, that

[1] Title 29, Chapter V, Code of Federal Regulations, Part 541, sec. 541.1, 5 F. R. 4077 (Regulations of the Administrator, Wage and Hour Division, U. S. Department of Labor, October 24, 1940, amended January 17, 1942). These regulations have been incorporated in the record of this case (R. 134).

there was no conflict with the controlling decisions of this Court, and that the petition should therefore be denied.

In preparing its brief on the merits, the Government assumed that the only question as to which the Court would desire to hear argument was that presented in the petition for certiorari. However, respondent's brief on the merits has, in effect, abandoned its prior contentions as to Section 7, and raises anew the issue as to whether the three engineers are "executive" employees.

In these circumstances it is suggested that the Court may appropriately limit its review to the Section 7 issue. On the one hand, respondent is, of course, entitled to urge any ground in support of the judgment below. On the other hand, review on writ of certiorari is ordinarily limited by this Court to the questions presented in the petition. This principle would seem to have particular force in a situation such as that involved here. Whether the three engineers employed by respondent were properly found by the district court to be "executive" employees is, we believe, a question which this Court would not ordinarily deem appropriate for review. The issue is peculiar to this case; it calls for appraisal of detailed technical evidence; it involves no issue of federal law as to which the circuit courts of appeals are in conflict; and its importance is, at least, con-

jectural.[2] If the Section 7 issue in this case is not reached, the net result would be a decision by this Court on an issue not sufficiently important to warrant certiorari, while the only question calling for Supreme Court review would remain unanswered.

This Court has frequently observed that its unique role in the American constitutional system requires that it limit its discretionary jurisdiction to the determination of controversies whose importance and character call for review by the highest court in the land. It may be questioned whether, in the circumstances of this case, the Court should exercise its discretion to enlarge its review beyond the Section 7 question, which was the only issue tendered by the parties upon the Court's consideration of the petition for certiorari.

II

If the Court should undertake to inquire into the question whether these employees were "executives," we submit that the ruling of the court

[2] Certiorari has twice been sought on this type of question, and in each case it was denied by this Court. See *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746; *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728. While, as pointed out by respondent (Brief for Respondent, p. 12), the court below held that a fourth employee was exempt under Section 13 (a) (1), the Government did not deem this question of sufficient importance to include it in the petition for certiorari.

below in this regard should not be disturbed. In setting up the "executive" exemption as an affirmative defense in this case,[3] respondent has not challenged the validity of the regulations issued by the Administrator.[4] Nor is it disputed that, since the regulation defining "executive" is phrased in the conjunctive, all six of the conditions must be met before the exemption from the Act will apply.[5] These conditions are, briefly, that the "executive" (A) have as his "primary duty" the management of the establishment or of

[3] Under Federal Rule 8 (c) of Civil Procedure, the burden of pleading and proving this defense is, of course, on the party claiming it, and the circuit courts of appeals have so held in decisions under this Act. *Schmidtke* v. *Conesa*, 141 F. 2d 634, 635 (C. C. A. 1); *Helliwell* v. *Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Fletcher* v. *Grinnell Brothers*, 150 F. 2d 337, 340–341 (C. C. A. 6); *Smith* v. *Porter*, 143 F. 2d 292, 294 (C. C. A. 8). As this Court recognized in *Phillips Co.* v. *Walling*, 324 U. S. 490, 493, "any exemption from [this] humanitarian and remedial legislation must * * * be narrowly construed."

[4] These regulations have been upheld by every circuit court of appeals which has passed on them. *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746; *Fanelli* v. *United States Gypsum Co.*, 141 F. 2d 216 (C. C. A. 2); *Helliwell* v. *Haberman*, 140 F. 2d 833 (C. C. A. 2); *Schmidt* v. *Emigrant Industrial Savings Bank*, 148 F. 2d 294 (C. C. A. 2); *Allen* v. *Atlantic Co.*, 145 F. 2d 761 (C. C. A. 5); *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8); *Knight* v. *Mantel*, 135 F. 2d 514 (C. C. A. 8); *Joseph* v. *Ray*, 139 F. 2d 409 (C. C. A. 10); *Walling* v. *Yeakley*, 140 F. 2d 830 (C. C. A. 10).

[5] *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 (C. C. A. 1); *Fanelli* v. *United States Gypsum Co.*, 141 F. 2d 216 (C. C. A. 2); *Smith* v. *Porter*, 143 F. 2d 292 (C. C. A. 8).

a customarily recognized department; (B) "customarily and regularly" direct the work of other employees; (C) have the authority to hire or fire other employees or, in the alternative, that his recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees be given particular weight; (D) "customarily and regularly" exercise "discretionary powers"; (E) be paid on a salary basis of not less than $30 per week; and (F) do not perform work of the same nature as that performed by employees under his supervision for more than 20 percent of the number of hours worked by those employees.

While the district court's "findings" stated, in the language of the Administrator's regulations, that the engineers in question met the conditions prescribed in the regulations, the court found no evidentiary facts to support such statements, and the record affords no basis whatever for a finding that the engineers meet any of the conditions, other than payment on a salary basis of not less than $30 per week. The circuit court of appeals correctly held that the district court's findings on this question were "clearly erroneous."[6]

[6] Respondent argues, in support of its contention that the engineers were exempt, that they "had always been recognized as foremen" (Brief for Respondent, p. 6), and that they receive various benefits accorded to supervisory employees (*Id.*, p. 6). While this may help to explain the company's belief that the men were exempt, neither those facts nor the

(A) With respect to the first condition, that the employee's "primary duty" consist of the management of the establishment where he is employed or of a customarily recognized department or subdivision thereof, the district court's finding (Finding 9, R. 149), referred to the "Steam and Electric Power Generating and Heating Department" as the "department or subdivision" in which the engineers were asserted to be executives and stated that the three operating engineers "were employed as foremen or supervisors * * * under a Chief Engineer in charge of the entire Department" and that "their primary duty consisted of the management" of that department. *Ibid.* This statement is clearly contrary to the evidence, and is, indeed, inconsistent with other statements in the same finding. Although the capitalized reference by the district court to a "Steam and Electric Power Generating and Heating Department"[7] would indicate that this

fact that the union may have finally conceded in 1944 that these employees were "foremen" or "supervisory employees" are relevant in determining whether they are "executive" employees under the tests provided by the Administrator's regulations. As is made clear by the last condition of application of the exemption (the "20 percent" test), "working foremen," though supervisory employees in every sense of the word, are nevertheless not exempt as "executives" under the regulations. See Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, pp. 15–17, referred to *infra*, p. 8.

[7] It may be noted, however, that later in the same paragraph the court refers to it as the "Electric and Steam Generating and Heating Department" (Finding 9, R. 149).

was a recognized department in the plant, it is nowhere referred to as such in the record.

It is not even clear from the finding whether the "department or subdivision" is the engine room or the entire power plant, consisting of both the engine room and the boiler room; the district court's opinion implies that it is the engine room alone, since it states that "there were no other employees in that department or subdivision" (R. 138). If the operating engineers were the only employees in the engine room, they had nothing but machinery to manage. The definition as a whole [8] and the Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, pp. 10–11,[9] make it clear that "managements," as used in paragraph (A) of the regulations, includes managerial authority over some personnel in addition to other executive responsibilities. The Report was officially adopted by the Administrator as his construction of the regulations, and if there were any ambiguity would be the "ultimate criterion * * * which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414.

It is equally clear that the engineers did not manage the boiler room. While O. W. Marsh,

[8] Particularly the requirement (B) as to supervision.

[9] Copies of the Report have been filed with the Clerk of the Court.

respondent's vice president and factory manager, testified that the company regarded the engineer on duty as being in charge of the entire power plant, his status as such must have been purely theoretical. The uncontradicted testimony of Page (R. 43, 45, 49, 53), Spooner (R. 56–57, 60), and Stegman (R. 65, 68–71) was that they did not in any way manage the boiler room. Their activities were limited to the engine room,[10] and even there they look to the chief engineer for supervision and orders. In the same finding (Finding 9, R. 149), in which the district court concluded that "their primary duty consisted of the management of the * * * Department, it described their duties as follows:

> * * * they were required to keep the machinery of the Department in good operating condition by packing, wiping, mopping, oiling, and making emergency repairs to the equipment; to read gauges, to listen for sounds indicative of any disorder; to make minor adjustments; to take appropriate action to supply steam necessary to operate the power plant which was dependent upon steam from the boiler room, and to report to their immediate superior any failure or breakdown for which they were unable to provide * * *.

[10] Except when they occasionally pitched in and helped to fire the oilers because "there's a war on" (R. 53) or "to help the plant out" (R. 56).

Thus, while the court attempted to bring the engineers within paragraph (A) of the regulations, the evidentiary facts found by it are inconsistent, on their face, with the conclusion that management was the "primary duty" of these employees.

(B) The district court's findings state that these employees "customarily and regularly directed the work of other employees in the Department" (Finding 9, R. 149). Again no evidentiary facts are found, and the evidence plainly contradicts this statement. As already indicated, there were no other employees in the engine room (R. 138). The company presented no testimony that the engineers customarily and regularly directed the work of the boiler room employees, and the three engineers testified that they did not direct those employees (R. 43, 49, 53, 56, 60, 65, 68, 70–71). They looked to the Chief Engineer, Latteman, as being in charge of both the engine room and the boiler room. On the one or two occasions in a period of several years when one of the engineers ventured to make suggestions to the boiler room employees, he was unsuccessful (R. 56). The district court's statement in its opinion that "the boiler stokers declined to take orders from the engineers, except Latteman, the chief engineer" (R. 138)—and this statement is supported by uncontradicted evidence (R. 56–57, 60, 67)—is hardly consistent with the con-

clusion that the engineers "customarily and regularly" directed the work of the boiler stokers."[11]

At best, respondent's witnesses established that the company wanted the engineers to act as foreman (R. 110). Even if this contention be accepted, the test under the Administrator's regulations is what the employees in fact did—whether they "customarily and regularly" supervised other workers.

At the argument of the case, respondent's counsel attempted to explain the refusal of the operating engineers to "supervise," and of the boiler room employees to be supervised by them, as due to a dispute with the union which was settled in

[11] Respondent, although apparently conceding that the operating engineers did not supervise the boiler stokers directly, relies on the district court's statement that they did so "through the chief engineer" (R. 138). The evidence in the record does not support this statement and shows, at best, that the operating engineers called the chief engineer when anything went wrong (R. 43, 56). This certainly does not amount to supervision, either direct or indirect. But even if it be assumed that the operating engineers did supervise the boiler stokers "through the chief engineer," the regulations make it clear that *direct* supervision is necessary to bring an employee within the test. Thus, when the Administrator intended to provide for indirect as well as direct action on the part of the "executive," he expressly said so in the regulations. For example, the test in paragraph (C) is "hiring or firing" or making "suggestions and recommendations" to that effect. In contrast, paragraph (B), requiring that the employee must be one "who customarily and regularly directs the work of other employees," obviously calls for direct supervision over those "other employees."

July 1944, at about the time when the engineers signed an agreement "to be regarded as Foreman, as in the past, with Foremen privileges and continue on a salary basis" (R. 151). The uncontradicted evidence, however, shows that, even following this settlement, up to and including the time of the trial of this case (March 22–23, 1945), the engineers did not attempt to supervise the boiler room employees and the latter declined to accept their supervision (R. 43, 49, 53, 56, 60, 65, 68, 70–71).

Respondent's argument seems to reduce itself to the contention that the exigencies of its business required around-the-clock operation and that, apart from the chief engineer, the operating engineers "are the only supervision the Company has in the Power Plant for the twenty-four hour service" (Brief for Respondent, pp. 5–6). The very fact that the power plant was operated successfully during a number of difficult war years with only the chief engineer exercising any supervision is a sufficient indication that the operating engineers were really needed and hired not to "supervise" but simply to perform a skilled mechanical task—that of operating and maintaining the power machinery in the engine room.

In finding that the engineers were "executives," the trial court was also apparently influenced by its view that "there is a necessity for considering

certain employees as executives or administrators when they are entrusted with the complex and delicate machinery of modern times. It often requires as much skill, discretion and judgment to keep such machinery in harmonious operation as to keep subordinates in cooperation" (R. 140). In framing his regulation, the Administrator followed the common usage of the term "executive" to apply only to those who supervise others. The Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, preceding the discussion of the items making up the definition of executive, specifically limited it to a "person who is a boss over men" or "whose responsibility is directly managerial—employees, in other words, who, in addition to other responsibilities, are concerned with the supervision of other workers" (Report, pp. 4, 10). As a contemporaneous construcion of the regulations by the Administrator who issued them, this Report is entitled to controlling weight. *Bowles* v. *Seminole Rock & Sand Co., supra.*

(C) There is likewise no evidence whatsoever that these employees met the third condition, that the executive have power to hire or fire, or that his suggestions and recommendations as to hiring, firing, promotion or other change of status of other employees be given great weight. It is not contended that the engineers had any authority to

hire or fire other employees, but the district court's finding states that "their recommendations and suggestions as to change of status of other employees would be given particular weight" (Finding 9, R. 149). There is not a scintilla of evidence in the record to support this statement. The company did not point out a single instance where the engineers had made any such recommendation (its witnesses did not even mention this point), and the engineers denied that they had done so or that it was their business to do so (R. 45, 56, 60, 65).[12]

(D) A fourth condition of the exemption is that the employee customarily and regularly exercise discretionary powers. The finding of the dis-

[12] It may be noted that the courts repeatedly have held the exemption inapplicable even where there was unquestionably more control over other employees than there was here. See *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180 (W. D. Tenn.), affirmed, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728 (chief radio engineer); *Schmidt* v. *Emigrant Industrial Savings Bank*, 7 Wage Hour Rept. 623 (S. D. N. Y.), affirmed, 148 F. 2d 294 (C. C. A. 2) (building superintendent); *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 (M. D. Ga.) (manager of a branch office who directed the work of other employees but had no authority to hire and fire); *Timberlake* v. *Day & Zimmerman, Inc.*, 49 F. Supp. 28 (S. D. Iowa) (captain of plant guards); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.) ("key men" or working foremen); *Corey* v. *Detroit Steel Corp.*, 52 F. Supp. 138 (E. D. Mich.) (night superintendent of maintenance); *Fellabaum* v. *Swift & Co.*, 54 F. Supp. 353 (N. D. Ohio) (shipping clerk supervising intrastate distribution of meat packing

trict court states, again in the language of the regulations, that the engineers "customarily and regularly exercised discretionary powers" (Finding 9, R. 150), adding only that they "were entrusted with the care of vital, dangerous and complicated machinery requiring the exercise of discretion to maintain continuous operation" (*ibid.*). There is little evidence as to the exact nature of the work of the engineers, except that they did what operating engineers usually do—maintain and watch the machinery. Certainly, these employees had no executive discretion. To decide that pumps need packing, to read gauges, to listen for disorder in the machinery, is not the exercise of discretion characteristic of a "true executive." See Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, p. 13. The stationary engineer is a skilled mechanic [13] who must exercise the discre-

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plant); *Walling* v. *St. Marys Sewer Pipe Co.*, 56 F. Supp. 345 (W. D. Pa.) (kiln foremen); *Simmons* v. *Straight Improvement Co., Inc.*, 7 Wage Hour Rept. 1060 (S. D. N. Y.) (superintendent of loft building); *Distelhorst* v. *Day & Zimmerman*, 58 F. Supp. 334 (S. D. Iowa) (building foremen, chief clerk, yard foreman); *Pakarinen* v. *Butler Bros.*, 218 Minn. 496, 16 N. W. 2d 769 (shift boss of mine).

[13] He is so listed in the United States Employment Service, *Dictionary of Occupational Titles*, Part II, *Titles and Codes*, 1939, p. 45, and by the Bureau of the Census, *Population—Comparative Occupation Statistics for the United States, 1870–1940*, 1943, p. 186, and is so regarded by the presi-

tion of a skilled mechanic within the limits of his job. As the district court said of the operation of radio transmitting equipment in *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180, 185, affirmed, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728, this is "essentially a mechanical task of a skilled nature." There, as here, the duties were not executive but were, in contrast, "skilled mechanical work."

(F) [11] The record likewise does not support the trial court's finding that the last condition of the exemption had been met, that the engineers "did not perform work of the same nature as that performed by non-exempt employees for more than twenty per cent (20%) of the number of hours worked in the work week by the non-exempt employees under their direction" (Finding 9, R. 150). Since there were no employees under the direction of the operating engineers, it is, of course, difficult to say how this test can be applied here. Obviously, it implies that the definition refers only to persons directing the work of other employees. But even if the boiler room employees were to be regarded as under the direction of the operating engineers, it is clear that the work of

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dent of the International Union of Operating Engineers. See "The Other Fellow's Job, The Engineer," *American Federationist*, Vol. 48, No. 2, August 1940, pp. 19–20.

[11] As already indicated, the engineers admittedly met the requirements of paragraph (E) of the regulations.

the latter was almost entirely manual,[15] and therefore of nonexempt nature. Again the district court's findings that this test was met, which is in the nature of a conclusion, is contradicted by the evidentiary finding that the engineers' duties consisted of "packing, wiping, mopping, oiling," etc. (R. 149). This type of situation is expressly dealt with in the Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, p. 18, referred to, *supra,* where it is stated: "Normally manual labor, including the operation and repair of machinery, will properly be counted as nonexempt work. Any exception to this may be found where the supervisor of a department sometimes participates in repair work of an unusually difficult nature which his subordinates cannot perform and which directly affects the continued operation of his whole department. Such instances would be rare." Significantly, the uncontradicted evidence in this case shows that the "repair work of an unusually difficult nature" had to be handled by the chief engineer, Latteman (R. 43, 56; see also Finding 9, R. 149). Ob-

[15] There is no evidence that the engineer did any nonmanual work except possibly the statement of O. W. Marsh that "many times they sit out there in a rocking chair just listening" (R. 112). Even if it be assumed that the work of the engineers was only partly manual, respondent clearly did not sustain the burden of proving that the manual functions did not exceed 20 percent of the number of hours worked in the workweek by the boiler room employees.

viously, it is he, and no one else who was the supervisor of the power plant.[16]

Respectfully submitted.

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FEBRUARY 1947.

[16] As stated in the Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, "A small department in a plant or in an office is usually supervised by one person. Any attempt to describe one of the other workers in the department as an assistant supervisor merely by giving him an honorific title will almost inevitably fail as there will not be sufficient true supervisory work to keep two persons occupied unless one of them performs a substantial amount of work like that performed by the nonexempt employees" (pp. 11–12).

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 564.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Petitioner,

v.

THE GENERAL INDUSTRIES COMPANY,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari To the United States Circuit Court of Appeals For the Sixth Circuit.

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ARGUMENT.

THE FINDINGS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS PRECLUDE ALLOWANCE OF THE PETITION UNLESS CLEAR ERROR SHOWN.

In the statement in Rule 38 of the reasons which will be considered by this Court in passing upon the propriety of a petition for writ of certiorari to review the decision of a Circuit Court of Appeals, it is said that although they neither control nor fully measure the Court's discretion they do indicate what will be considered.

The petitioner, hereinafter called the Administrator, does not assign any reason for the allowance of the writ except an alleged conflict with the decision of this Court in the two cases, *Overnight Motor Company v. Missel*, 316 U. S. 572, and *Floyd v. DuBois Soap Co.*, 317 U. S. 596.

It may be assumed, therefore, that the Administrator agrees that the decision of the Sixth Circuit Court of Ap-

peals, affirming Judge Wilkin of the District Court for the Northern District of Ohio, was not in conflict with another decision of a Circuit Court of Appeals on the same matter and was not a decision of a question of Federal law which has not been but should be settled by this Court.

In order to claim an alleged conflict with the *Missel* and *Floyd* decisions the Administrator has devoted the major portion of his brief to a minute discussion of portions of the evidence in an effort to discredit the construction of the facts contained in specific findings of fact of the District Court and the decision of the Circuit Court of Appeals affirming those findings.

The rule is well settled that in such circumstances where two courts have agreed this Court will not enter upon a minute analysis of the evidence. *Boehmer v. Pennsylvania Railroad Co.*, 252 U. S. 496. Furthermore, even upon consideration of the evidence, this Court under an established rule accepts the findings unless clear error is shown. *Pick Manufacturing Company v. General Motors Corporation*, 299 U. S. 3.

WALLING v. BELO CORP. HAS DETERMINED THE ISSUE PRESENTED HEREIN.

The findings of fact by the District Court, for the most part based upon oral testimony, demonstrate strikingly their similarity to the facts presented to this Court in the case of *Walling v. Belo Corp.*, 316 U. S. 624. Finding number 10 and the first clause of Finding number 11 (R. 150, 151) are set forth seriatim because they succinctly state the facts attacked in the Administrator's petition.

> "(10) That prior to February 1, 1941 the Shift Foremen or Supervisors in the Steam and Electric Power Generating and Heating Department were compensated on an hourly rate; that the International Brotherhood of Firemen, Oilers and Helpers, Local No. 198, of Elyria, Ohio, claimed the right to represent the Shift Foremen as supervisors and through negotiations

with the defendant in their behalf arrived at an agreement that they would be compensated on a monthly salary basis, sufficient in amount to compensate them under the Fair Labor Standards Act for regular and overtime employment at the regular hourly rate of pay they were receiving prior to February 1, 1941; that the defendant and the Union agreed to submit to the National Labor Relations Board the issue of the right of the Union to represent the Shift Foremen or Supervisors.

"That pursuant to such agreement the Shift Foremen were changed to a salary basis on February 1, 1941 and the defendant, in order to avert the threat of a strike by the Union, dealt with the Union as the bargaining agent for the Shift Foremen pending a decision by the National Labor Relations Board of the right of the Union to represent them; that the amount paid in salary to Jasper Payne, Peter Spooner and Fred Stegman was more than the amount which they would have earned at the regular hourly rate of eighty cents (80¢) per hour paid prior to February 1, 1941, plus overtime pay under the Fair Labor Standards Act at the rate of time and one-half the regular hourly rate of pay for the scheduled work week of fifty-one (51) hours per week.

"That on July 25, 1944 Peter Spooner, Jasper Page and Fred Stegman signed an agreement with the defendant reading as follows:

> 'We the undersigned choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges and continue on a salary basis.'

"That on August 18, 1944, the Union, in its written contract with the defendant, agreed to settle the issue of the Union's right to represent Spooner, Page and Stegman by excluding them from the bargaining unit and abandoning their claim of the right to collectively bargain for Shift Foremen or Supervisors.

"(11) That throughout the period in question the defendant never intended to circumvent or evade the Requirements of the Fair Labor Standards Act, nor intended that compensation paid to its employees was

to be any less than the minimum required by the Act;" (R. 150, 151).

The Circuit Court expressly affirms and approves as follows at page 715 of its opinion reported in 155 F. 2d 711:

> "In an action to restrain violations of the Act the burden of proof rests on the Administrator to establish that the statute has been violated as to the engineers. The District Court found no evidence of intention to violate the act and affirmatively found that the employer had compensated the engineers in accordance with the statute. There was a conflict of evidence on this point but the finding of the District Court is supported by substantial evidence. While the men state that they received no overtime, their testimony is lacking in circumstantial detail while the testimony of the factory manager and one other witness is precise upon the exact point. The salary of these men was formerly paid on an hourly basis. A change to a salary basis was negotiated between the union and the employer, the salary being calculated to include an allowance of time-and-one-half for overtime. The men concede that there was a controversy with the union over their status, and that the shift from hourly to monthly compensation followed. The pay was figured in a shift from hourly pay to monthly salary at 80 cents an hour, which was the amount they would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled work-week of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time their salary includes an allowance of one-and-one-half pay for overtime. The District Court was correct in its conclusion that the appellee has compensated its non-exempt employees for overtime employment in accordance with the requirements of the Act and the injunction was properly denied.
>
> "The judgment of the District Court is affirmed."

As in the *Belo* case the facts reveal further that the three engineers received vacations with pay, special bonuses at the end of the year, full pay during periods of illness or other justifiable absences, and life insurance and pension benefits at Respondent's expense (Fdgs. 5, 6 & 7; R. 145-147). It is significant that hourly paid employees do not receive the foregoing perquisites of the salaried employees.

As in the *Belo* case the contracts between the Respondent and its three engineers were apparently satisfactory to the latter for not only have they not filed suit for additional overtime compensation but they have expressly requested continuance of the arrangement (Fdg. 10; R. 151).

As in the *Belo* case the Administrator here seeks a permanent and all-inclusive injunction against the Respondent although the petition only challenges a few of the large number of employees of the Respondent, and after two lower courts have found no violation of the law.

The *Missel* and *Floyd* cases upon which the Administrator relies involve fact situations completely different from this case. Missel was a rate clerk for a motor transportation company whose duties involved wide fluctuation in the time required, as opposed to the regular and continuous fifty-one (51) hour shift operation of the power plant by Respondent's three engineers.[1] Although Missel

[1] As an example of the misleading character of the Administrator's statements in his brief with respect to the record, he states that the hours the engineers "actually worked sometimes varied from 42 to 59½" (Admr's. brief page 5).

The only hours worked in excess of the regularly scheduled 51-hour week during the year 1944, used as an example in the case, occurred during four weeks in the fall because of a special and nonrecurring inventory situation requiring 8½ hours work on Sunday (R. 125-128). The Company obtained special permission from the Salary Stabilization Unit of the United States Treasury Department to pay the men extra straight time overtime for that occasion (R. 126). There was no other time during the period in question that the three engineers exceeded the scheduled 51-hour week. Certainly, it is improper to imply that during the four-year period 1941-1945 there was a variable work week.

was paid a weekly wage which upon the basis of the statutory minimum requirements of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A. sec. 201), hereinafter called the "Act," could be construed as sufficient in amount to compensate for overtime at one and one-half times the statutory minimum rates, there was no contractual agreement with Missel based upon a rate per hour as in this case, and the *Belo* case.

The *Floyd* case is a simple one paragraph per curiam reversal of the Ohio Supreme Court which had decided the identical issue of the *Missel* case contrary to this Court's decision therein.

THE RECORD IS CLEAR THAT THE CONTRACT OF EMPLOYMENT SPECIFIED A REGULAR HOURLY RATE.

The Administrator in order to invoke the doctrine of the *Missel* case as support for this petition made the basic statement that:

> "The district court made no finding and the record contains no evidence that the contract of employment specified any regular or overtime hourly rate of pay." (Admr's. brief page 4.)

Apparently because the contract between the Respondent and its engineers governing their hourly rate of pay was not in writing, the Administrator simply ignores the testimony and the District Court's finding that the regular hourly rate of pay agreed upon was 80 cents per hour. The men themselves, with the help of the union, demanded that this hourly rate be converted to a salary on a regular 51-hour weekly schedule in an amount sufficient to compensate for overtime in order that they could obtain the privileges granted salaried employees and denied hourly paid employees. Thus, Mr. Glen O. Smith testified:

> "Q. Then the following question is this: Did the amount of salary per month include the scheduled overtime worked by these men on the three-shift basis at one and a half times their regular rate of pay per hour?

A. That is right, that is the way Mr. Seitz and I approached this question.

The Court: But that would have to be an estimate, it couldn't be exact?

The Witness: It couldn't be an exact figure.

The Court: Sometimes it might be over-payment, sometimes it would be under-payment.

The Witness: Yes, Judge. There were a number of factors that enter into that. These men, all of them, wanted to be on a salary rate because it took them into another class where they got so many other benefits they hadn't had. For example, if they were on salary if they were home sick for one day, one week or six months, they got their pay, their pay continues; while if they were working on hourly rate if they were absent just half an hour they didn't get paid for that. So there were many factors that entered into this, and the union and I sat down and negotiated this salary, which was acceptable to the union and the employees and contemplated regular time pay and regular overtime for the work which was agreed on at that time." (R. 97.)

The conversion, made in accordance with the agreement, although not originally mathematically correct was made so in August, 1941, when the Page and Spooner salaries were raised to $195 per month for the reasons stated by Mr. Glen O. Smith as follows:

"A. Well, I wouldn't want to say positively. Of course, the reason we made it $195 in August is because you add and subtract and multiply and get $195. The reason we made it $195 in August was because the union demanded it and got it." (R. 103.)

This contract arrived at through bargaining with the employees and the union was none the less a valid and enforceable wage contract although not reduced to writing. There is no prohibition against unwritten contracts in the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. sec. 151), and their validity is recognized in Ohio. *Ralston v. Kohl's Adm'r.*, 30 O. S. 92.

THE ADMINISTRATOR ASSERTS THAT EVEN THOUGH THE ENGINEERS WERE PROPERLY COMPENSATED FOR OVERTIME WHEN ORIGINALLY CONVERTED FROM AN HOURLY RATE TO A SALARY, SUBSEQUENT INCREASES CONSTITUTE A VIOLATION OF THE ACT.

The Administrator argues that even though the original conversion fulfilled the requirements of the Act, the Respondent was in violation the instant it gave its engineers an increase in salary. This is, indeed, a strange doctrine for the Administrator to advance. Such an argument is a negation of the avowed purpose of the Act. Congress, the Administrator himself, and the courts have asserted that a purpose of the Act is to put a floor under wages and to restrain employers from exploiting their employees. In spite of a diligent search Respondent has been unable to find any public statement by the Administrator or decisions of the courts which set forth as a purpose of the Act the placing of a ceiling or limitation upon increases in the compensation of employees.

When employers follow a policy of paying only the minimum wage rate of forty cents (40¢) an hour required by the Act and adopt the particular inflexible formula for computing overtime set up by the Administrator, they are apparently safe from the threat of actions by the Administrator seeking a permanent injunction. If the Administrator's position in the present case is any criterion then such employers will remain immune from suit so long as they do not change their wage plan and do not increase wages. On the other hand, employers who realistically seek to increase the morale and good will of their employees by offering to them the security of a monthly salary, paid whether they work or not, and increases in such salaries whenever possible, must do so at the peril of defending their course of action through the courts in an effort to avoid the penalty of a permanent injunction.

The Administrator cites the payment of the so-called "straight time overtime" made pursuant to war time wage

and salary controls as evidence of Respondent's intention to abandon or amend its original agreement with the engineers. The record is clear that during the war both Respondent and its employees were no longer free to bargain with respect to compensation without following intricate and complex rules and regulations and obtaining specific approvals for increases or decreases from the agencies charged with the administration of wage and salary controls (R. 117, 118).

The Administrator's argument ignores the fact that the so-called "straight time overtime" was simply a fiction resorted to by the Salary Stabilization Unit to avoid the necessity of approving basic increases which might exceed the "Little Steel Formula" used by the President during the war to hold wage and salary increases to a ceiling of 15% above the levels of 1941. The "straight time overtime" was not paid in lieu of overtime compensation required by the Fair Labor Standards Act but was in reality a fringe increase, the details of which were beyond Respondent's control. It is significant also that once having agreed to increases in compensation, no decreases in compensation below $5000 per year can be made without specific approval of either the Wage Stabilization Board or the Salary Stabilization Unit (Act of October 2, 1942, 56 Stat. 765 c. 578).

When Respondent is required to make a war time increase in a specific manner and is prohibited from changing the amount or manner of payment without obtaining approval it cannot be said to evidence an intention by the Respondent or its employees to change their basic understanding by which the salaries paid included both straight time and overtime for a 51-hour week.

In most of the cases decided by this Court adversely to the employer, the latter has been guilty of computing "the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes" as so aptly

stated by Mr. Justice Murphy in *Walling v. Helmerich & Payne Inc.*, 323 U. S. 37. In this case the Administrator in his brief has seized upon the establishment of the fiction of "straight time overtime" by the Salary Stabilization Unit in order to make computations and assumptions with respect to the regular hourly rate that are wholly unrealistic and artificial and which would certainly negate the statutory purposes.

It is a basic principle in the administration of social legislation, such as the Fair Labor Standards Act, that the Administrator as a representative of all the people, should seek to serve their best interests. It is pertinent to inquire, therefore, as to how such interests can be served if the Respondent must reduce the salaries of the engineers to $195.87 a month in order to satisfy an inflexible, artificial, and unrealistic formula set forth by the Administrator. Again, how can the Respondent make such a reduction in salaries in view of the existing prohibitions of the Wage Stabilization Board and the Salary Stabilization Unit against any reduction of war time wages and salaries? How can the best interests of the employer and the employee in the present case be served when possible resignation or strike action by the engineers may result from a reduction in their salaries or conversion to an hourly rate?

It is no answer to say that the Respondent can convert the engineers from a salary to an hourly rate. They don't want that. They want the assurance of a salary, whether they work or not, as well as all the other perquisites of a salaried employee, including year end bonuses, group life insurance, pension benefits, sick leave, and vacations with pay, not given to hourly rated employees.

THE ADMINISTRATOR ASSERTS THAT EVEN THOUGH THE RESPONDENT IS IN COMPLIANCE WITH RESPECT TO TWO OF ITS ENGINEERS IT CANNOT PLACE STEGMAN ON THE SAME BASIS.

It is true that Stegman was employed on a salary at the time the other engineers, Payne and Spooner, were changed from an hourly rate to a salary. This was because Stegman was formerly the Chief Engineer and had always received a salary as an executive. On or about the time Payne and Spooner went on a salary Stegman was demoted from Chief Engineer to an operating engineer at his own request for reasons of health (R. 64). Thus, he assumed the same position as Payne and Spooner, except that he was on the day shift while Payne and Spooner each had a night shift. The Respondent properly retained him on the same salary basis which included payment for straight time and overtime for a 51-hour week. Although he received $5 a month less than the other two engineers this was agreed to between Stegman and Respondent because he worked on the day shift and had the help of the Chief Engineer in the performance of his duties (R. 130).

The Administrator's argument is tantamount to a claim that the Respondent cannot use employees as engineers on a salary when they have not worked previously on an hourly rate. We do not believe such an unrealistic and impractical argument can have any weight with this Court.

CONCLUSION.

It is respectfully submitted that the considered opinions of the two lower Courts that the three engineers have been compensated for overtime in compliance with the Act are entitled to stand unless clear error is shown. The Administrator's treatment of the record in his brief and his request that this Court grant the petition and reverse the judgments of the two lower Courts "without further argument on the merits" (Admr.'s brief p. 14) appear to this

Respondent as an effort to avoid the sober consideration which ought to precede any such step.

The Administrator is asking for a permanent and all-inclusive injunction. The assertion of such a drastic remedy should call for restraint and sober reflection upon his part for there is little doubt that the courts approach the problem in that fashion.

> "The granting of an injunction is a drastic action, and the Court should not grant such orders unless it is clear that the violations of the Act are such as to clearly justify the order. Minor violations of the Act would not justify such drastic measures. Ample authority is readily found which leaves the matter to the sound discretion of the Court." *Walling v. Halliburton Oilwell Cementing Co.*, (52 F. Supp. 408).

Although the Administrator has admitted that Respondent at all times has acted in good faith, that the three employees involved are desirous of continuing the same arrangement and that the compensation and other benefits extended to these three employees are extraordinarily liberal in comparison to other employer-employee agreements, he has relentlessly pursued an injunction because of alleged violations of his technical, artificial and wholly unrealistic mathematical computations.

Respondent respectfully asks that the petition be denied.

Respectfully submitted,

CARL F. SHULER,
GLEN O. SMITH,
M. REESE DILL,
Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 564

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Petitioner,

v.

THE GENERAL INDUSTRIES COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

GLEN O. SMITH,
M. REESE DILL,
CARL F. SHULER,
Attorneys for Respondent.

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OPINIONS BELOW.

The opinion of the District Court (R. 137-141) is reported at 60 F. Supp. 549. The opinion of the Circuit Court of Appeals (R. 159-164) is reported at 155 F. 2d 711.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 28, 1946. (R. 159.) A petition for rehearing was filed on June 17, 1946 (R. 165-174), and denied on July 8, 1946. (R. 176.) The petition for a writ of certiorari was filed on October 3, 1946, and granted on November 12, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Upon trial, the District Court found that the three Foremen Engineers, Page, Spooner and Stegman, were exempt employees under the provisions of the Fair Labor Standards Act of 1938 by virtue of Section 13 (a) of said Act and Section 541.1 of the Regulations of the Administrator of the Wage and Hour Division of the United States Department of Labor, hereinafter referred to as the "Act." (R. 152.)

The Court also found that the three Foremen Engineers were properly compensated under the Act even though considered non-exempt, thus finding against the Administrator on both grounds. (R. 150.)

The District Court found that the Assistant Paymaster Payne was also exempt under the Act. (R. 152.) Since these four employees were the only ones whose status was questioned, the injunction sought by the Administrator against the Respondent was denied. (R. 153.)

The Circuit Court affirmed the District Court in denying the injunction holding that the Assistant Paymaster was exempt and that the three Foremen Engineers though non-exempt had been properly compensated under the Act. (R. 159 to 164.)

Respondent contends that the finding of the Circuit Court that the three Foremen Engineers are non-exempt employees cannot be supported by the facts or the evidence in the case and there is no justification for the reversal of the finding of the District Court on this subject. The question is properly before this Court for consideration even though Respondent did not apply for certiorari. *Axel Langnes v. Green*, 282 U. S. 531; *Public Service Commission of Puerto Rico v. Havermeyer*, 296 U. S. 506.

Thus, the questions to be determined are:

(a) Was the finding of the District Court that the three Foremen Engineers were exempt employees

based upon proper and sufficient evidence and not contrary to the law?

(b) Was the Circuit Court justified under the facts or the law in reversing the District Court findings on this subject although affirming the final judgment?

(c) The question as to the adequacy of compensation of the three Foremen Engineers only becomes pertinent and necessary should they be determined to be non-exempt employees.

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201, *et seq.*) are as follows:

"Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce"

* * * * *

"(3) For a work week longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Sec. 13 (a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator) * * *."

ARGUMENT.

THE THREE FOREMEN ENGINEERS ARE EXEMPT, EXECUTIVE EMPLOYEES.

The Respondent is located in Elyria, Ohio and at the time herein mentioned employed more than 1,700 people. (R. 5.) It is engaged in the manufacturing of plastic and metal machine products, being one of the major producers of plastic products. (R. 5.)

To properly determine and decide the questions presented here, the nature, extent and importance of the Power Plant and its employees must be understood. Accordingly, we quote from the testimony of O. W. Marsh, Vice President and Works Manager of the Respondent. There is other testimony supporting this, but not one word to vary or deny.

"Q. As works manager down there you are familiar with the power plant of the General Industries Company?

A. Yes, sir.

Q. Would you just briefly describe the functions of it and the equipment, and so forth?

A. Well, we are one of the few concerns in this area that manufacture their own electric power as well as high pressure steam. We are in the plastic business, and as well as steam we use a tremendous amount of air. We have four boilers, just about go into this room, and we have four engines that generate this DC power which we use. Through all these years that I have been there we have always felt that this power plant was one of the most important departments we had in our plant, not only from the angle of investment but the lives at stake if anything should happen in this plant. We might not only blow ourselves to pieces but perhaps a quarter of Elyria. It is not just simple machinery. These engines run probably $40,000 a piece. Of course, they have a very heavy base. It is a lot different than the ordinary factory that buy their power and have a stationary engineer that works with low pressure steam for heat-

ing and plating and simple work. We are one of the few in this area that manufacture our own power.

Q. Would you just say something in connection with the importance of steam in your molding of plastics and pressure necessary?

A. Well, 150 pounds pressure, of course, is generally away above that used in any manufacturing business, but in this plastic industry we require that high pressure in order to get the heat units that is necessary to transform this plastic material into final shape.

Mr. Ditto: If it will save any time, we could stipulate the employees have an important mechanical job, and we have no intention of belittling their type of work.

The Court: It is in now and is not disputed so you need spend no more time or call another witness.

The Witness: Might I just say this, your Honor? Sometimes in the past I can recall where perhaps one of these workmen would come in, and let's say slightly under the influence of liquor. We hold these engineers responsible to either send that man home or at least get in touch with somebody, even if we have to go to the president, because they are in a very dangerous position, not only for damage to property but loss of lives." (R. 109-110.)

On account of the nature of the business it is necessary to operate the Power Plant around the clock at least six days per week. (Fdg. 9, R. 149.) This is done by three shifts per day. (Fdg. 9, R. 149.) In charge of the Power Plant is a Chief Engineer subject to call at all times in emergencies, and three Foremen Engineers, one of whom is in charge of each of the three shifts. (Fdg. 9, R. 149.) There are a number of firemen and coal passers employed on each shift. (Fdg. 9, R. 149.)

From the very beginning of the Company's operation these firemen and coal passers were under the jurisdiction

and supervision of the Foremen Engineers. (R. 94.) The Chief Engineer and the three Foremen Engineers are the only supervision the Company has in the Power Plant for the twenty-four hour service and they had always been recognized as foremen and had received all the special benefits thereof, such as unlimited sick leave, and more liberal insurance and vacations, etc., which special benefits were only available to the supervision. (R. 94, Fdgs. 5, 6, 7, R. 145 to 148.)

All went well in the Power Plant until the latter part of 1939 when the International Brotherhood Firemen, Oilers & Helpers Union, Local 198 of Elyria, Ohio, demanded that, among other things, its bargaining unit under its contract be enlarged to include the Foremen Engineers, —up to this time only the firemen and coal passers were eligible. (R. 93.)

Incidentally, the Respondent in the operation of its plant is blessed with four different unions, each having separate bargaining units and often competing and not too friendly with each other. (R. 93.)

The problems on this subject with Local 198 are set forth in the testimony of Mr. Glen O. Smith who handled the negotiations on behalf of the Respondent. Nowhere in the record is his testimony contradicted or refuted. We quote:

> * * * "Well, when Mr. Seitz and I got together in connection with his demand for a contract for all of the powerhouse employes, the first and most difficult problem when we met was the question of these engineers. Mr. Seitz and his union insisted they were not supervisory employees or foremen and that therefore they belonged to the union. The Company took the position these engineers were supervisors, had always been supervisors, and were the only supervision they had in their powerhouse, and that accordingly, under the law, they could not belong to the union.

Well, that caused a lot of serious trouble. It was difficult to resolve the union's point of view and the company's point of view, but, under threat of strike, stopping of the powerhouse which would stop all of the plant—which had happened sometime previous to this—the company finally made this kind of concession on this question: that if the engineers wanted to belong to the union the company would shut its eyes to that fact and waive that question, with this proviso which was written into the contract. The contract, in general, under the representation clause, said that the union would represent all of the employees in the powerhouse except supervisors, and then there was a clause put in which indicated that the question as to whether or not a man was a supervisor would be determined finally as between the parties by the National Labor Relations Board.

That contract was executed, as I remember, in September of 1940. It was a contract for a year." (R. 93-94.)

* * * * *

The Witness: Well, we executed this first contract in September, 1940 for a year.

Four or five months later Mr. Seitz came to me complaining bitterly about the fact not all the engineers were joining his union, and it was causing a great deal of friction in the powerplant; that the firemen refused to take orders from the engineers unless they did belong to the union, and unless that thing was resolved and straightened out they were going to pull the fires. That, plus the fact of overtime. He raised the question with me again, insisting that due to the fact the engineers were on an hourly rate of pay, that they weren't supervisors.

Well, that opened the door to a possible way of restoring peace in the powerhouse. We sat down and negotiated a new contract, some time the early part of 1941, although the other contract had not yet expired, and in that contract we put the same language in with reference to the question as to whether they were or were not supervisors, but we negotiated a salary rate for the engineers. We took the engineers off of the hourly rate.

Mr. Reynard: May I enter an objection? If there is a salary arrangement in the contract we should have the contract.

(Further argument.)

The Witness: Well, for the benefit of the record I am perfectly willing. I have before me all four of the contracts we have executed with this union, they are copies. I am perfectly willing to offer them into the record and to counsel for the Government.

The Court: Let counsel examine them. Proceed.

A. (Continued) As a result of that, we executed a new contract dated March, 1941, and the basis of this new contract was that we put all of the engineers on a salary basis, and we also reduced the numbers of hours that the engineers had been working. If I remember they had been working an average of about 56½ or 57 hours per week. We negotiated a cut in those hours, I think down to 51 or 51½ hours per week, and agreed on a salary per month of $185, which salary was to include all overtime, and the pay for the regular scheduled work week which was 51 or 51½ hours.

Now that rate of pay, as I remember it, was definitely negotiated with Mr. Seitz, the business agent of the union, with myself, and following that negotiation and agreement, the shop committee from the powerhouse and Mr. Marsh came up to Cleveland and met with Mr. Seitz and me, at which time we signed this agreement. That was done in my office.

It might be interesting here to note that all through these negotiations and all our dealings with this union, although the union insisted the engineers could belong to the union, at no time did we ever have an engineer on the shop committee. No engineers were ever on that shop committee, and as a result it created a difficult problem in the powerhouse.

Now following this negotiation in March of '41, we have had many negotiations with Mr. Seitz, representing the union, and the shop committee, and up until this past summer this question of whether or not the engineer was a supervisor or not was always pres-

ent. The union never took the problem definitely to the National Labor Relations Board for a decision. It was a current problem all that time until this past summer when the union signed our last contract. They waive the right to represent the engineers, and we drew a contract which represents, or which is representative for all of the employees in the powerhouse except the engineers. So that under the present contract the union does not represent the engineers, although I still understand either one or two of them still belong to the union." (R. 95-96.)

In brief, this whole controversy came from a union program of duress to force the Company to compel and permit the Foremen Engineers to join the union and become part of their bargaining unit. The strategy was two-fold—to threaten strike and close the whole plant, and to have the firemen and coal passers refuse to take orders from the Foremen Engineers.

This created a very serious problem in addition to the threat of a strike closing the whole plant. The big problem was, do production workers in any department have a right under any law, or strained construction thereof, to take the position that they will not submit to or be amenable to the supervision provided by the Company unless and until that supervision joins the union of their, the production workers, choice?

To have conceded this at that time the Company would have been confronted with the same problem in all its other departments, including those being bargained for by three other unions. Clearly, this would have created an impossible situation.

The Company in this difficult position, adopted a very fair and proper alternative. It insisted that it was entitled to and always had had supervisors in the Power Plant; that the engineers constituted that supervision; and that it was the duty and obligation of the engineers to supervise and for the firemen and coal passers to accept the same.

During the next three years while the dispute was in abeyance the Respondent never receded from its position and the Union did not press the matter before the National Labor Relations Board. (R. 96.) At least one of the Foremen Engineers, Page, joined the Union (R. 46) and another, Spooner, was not sure whether he belonged to the Union or not. (R. 59.)

The next development took place July 25, 1944 when the Foremen Engineers were receiving monthly salaries in excess of $200.00, five hours of straight time overtime allowed as a maximum wage increase by the Salary Stabilization Unit of the United States Treasury Department, unlimited paid sick leave, and all the other perquisites given to supervisors. (Fdgs. 5, 6, 7, R. 145 to 148.) Desiring to retain the benefits of supervisors and end the dispute, the three Foremen Engineers on their own behalf entered into a new signed and written agreement with the Respondent reading as follows:

> "We, the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges and continue on a salary basis." (Fdg. 10, R. 151.)

Within a few days after the Foremen Engineers decided to abandon their dual position, the Union conceded that the Foremen Engineers were supervisors and not eligible to be included with the firemen and coal passers in the bargaining unit. (Fdg. 10, R. 151.)

But as the Union laid down the cudgel the Administrator took it up and, on the sole basis that the Foremen Engineers said to him that they did not supervise anybody, he now claims they are non-exempt.

Under these undisputed facts, how can the Administrator be heard to say that these Foremen Engineers are non-exempt because they did not supervise anybody? Just because a group of production workers temporarily decide, for union reasons, not to accept supervision they cannot

thereby disqualify that supervision, certainly not as long as that supervision is maintained, kept on a job, paid, and not displaced. The only evidence offered by the Administrator on this subject was some of the engineers themselves. The essence of their testimony was that they neglected their responsibility as Foremen Engineers because the firemen and coal passers refused to take orders from them, and followed the dual self interest that they would like to keep all of the benefits and prerogatives of a Foreman Engineer and also the benefits, if the Administrator could compel it, of a non-exempt employee. (R. 41 to 72.)

It is almost unbelievable, but nevertheless true, that after the Administrator knew or was advised of most of the facts recited he filed his action against this Respondent seeking the extraordinary remedy of a permanent injunction. This action was based upon an affidavit secured by a youthful and inexperienced inspector without even inspecting. (R. 30.) The record shows that he never went to or entered the Power Plant—and no other agent of the Administrator has seen fit to do so either—but instead accepted the self serving declarations of the Foremen Engineers "that they did not supervise anybody." (R. 39.) Apparently, that was enough to satisfy him and the Administrator. The Company's problem, the temporary reason, or nature of the condition was of no importance or consideration. Likewise, this same inspector offered his affidavit in the case of the Assistant Paymaster Payne. (R. 9 to 11.) This, after the Respondent Company had written an accurate and detailed description f the job and duties of the Assistant Paymaster to the Administrator and asked for a determination as to whether or not said employee was to be classified exempt or non-exempt. (R. 17.) Curiously enough, the very attorney who tried this case below answered that inquiry and advised the Respondent that from the facts stated in the letter in his opinion the

employee should be classified "*exempt.*" (R. 17.) That was done. That letter of the Respondent is in the record and at no time or place did the Administrator or his counsel try to attack or impugn the accuracy thereof. Even so, the opinion was reversed, or at least not adhered to by the Administrator, because the Assistant Paymaster's case was included in seeking injunctive relief against the Respondent. However, the two Courts below ruled that this employee was exempt, which apparently satisfied the Administrator since he has not included it in this case before this Court.

In the light of the uncontradicted and undisputed facts, we seriously and urgently insist that the Circuit Court erred in reversing the District Court in its finding that the three Foremen Engineers were exempt employees under the Act.

THE FOREMEN ENGINEERS HAVE RECEIVED ADEQUATE COMPENSATION FOR OVERTIME.

It is undisputed that Respondent had always treated the Foremen Engineers as exempt and hence that no effort has ever been made to compute their compensation within any rigidly prescribed formula. In fact, there was no *Belo* case formula approved by this Court when the negotiations with the Union were completed in 1941. It was only because of the Union's demand that the Foremen Engineers were put on a regularly scheduled 51 hour week and converted from an 80¢ hourly rate to a salary which Respondent agreed would be sufficient to pay for 40 hours of straight time and eleven hours of overtime at time and one half. (R. 95, 96.)

Respondent's only concern over this Court's affirmance or rejection of the doctrine of the *Belo* case is directed toward the principle of freedom of contract between employer and employee necessarily involved in that case. Respondent sought to reach agreement with the Foremen Engineers and the Union which purported to act for them in such a manner that their every interest would be pro-

tected without the sacrifice of basic management principles. It was for that reason alone that an allowance was made for overtime—not because Respondent felt it was required to do so and tried to devise a formula to circumvent the Act. If this Court affirms the doctrine of the *Belo* case and rules that Respondent has properly compensated the Foremen Engineers, as in the decision of the Circuit Court, it may be an equitable result financially, but Respondent will be faced with numerous practical supervisory problems to which there will be no solution.

CONCLUSION.

It must be remembered in considering this case that during the time herein mentioned our country was engaged in World War II and that the Respondent was engaged in a most important, urgent and "all out" war effort with many attendant problems. How the Respondent met its obligations is in the Record and speaks for itself.

The Foremen Engineers and the Union by scheming and conspiracy temporarily made it difficult for Respondent while they persisted in conduct designed to force Respondent to include them in the bargaining unit. There was no reason, nor is there a present reason, to continue that struggle after the July 25th, 1944 voluntary agreement that they had been supervising, were presently supervising, and would continue to supervise the Power Plant. The conflict between this simple agreement to supervise and their testimony as to their conduct from July 25th, 1944 until the time of trial, was considered and weighed by the District Court. Judge Wilkin found specifically that, despite some of their testimony to the contrary, the three Foremen Engineers did in fact supervise the firemen and the coal passers on their respective shifts as they were instructed to do by Respondent. (Fdg. 9, R. 149.) This finding is the crux of the case and under Rule 52 of the Rules of Civil Procedure should not be set aside unless clearly erroneous.

The Circuit Court in setting aside the District Court's finding said that the evidence is not contradicted that the Foremen Engineers could not "* * * give orders to any man in the boiler room." (R. 163.) *This is not the fact nor the evidence.* Not only were the Foremen instructed by Respondent to give orders to the men in the boiler room but they agreed in writing to do so. It is significant that the Administrator did not call any of the firemen or coal passers to testify on this subject but relied entirely on the self serving declarations of the Foremen Engineers.

The District Court ruled out Inspector Morgan's testimony about the Foremen Engineers when it developed during the trial that it was entirely hearsay. Similarly the District Court in ruling upon the credibility of the testimony of the Foremen Engineers disregarded their claim that in violation of their written agreement they did not give orders to the firemen and coal passers. The District Court in accepting as true the evidence of the Respondent that they did in fact give orders to the firemen and coal passers was fulfilling his function as the trier of the facts.

But entirely apart from the credibility of the witnesses the uncontradicted evidence substantiates the District Court. The absolute necessity for supervision around the clock, the vital and dangerous functions of the Power Plant, the long and difficult dispute with the Union and the Foremen Engineers, the receipt by the Foremen Engineers for years of all the perquisites of supervisors, their inclusion with other supervisors in the application for approval of salary increases, the admission by the Administrator that Respondent was entirely bona fide and consistent in its classification of and instructions to the Foremen Engineers —all clearly substantiates the District Court. Such evidence certainly refutes the Administrator's claim that the finding of the District Court was clearly erroneous.

In conclusion, the Respondent respectfully urges upon this Court consideration of the impossible situation created by treating the Foremen Engineers as non-exempt.

If the Foremen Engineers are non-exempt because they do not supervise, how can Respondent provide supervision? Must Respondent employ "Super Cargo" or must Respondent discharge and replace the present Foremen Engineers? If not, must Respondent put them back on an hourly rate, deprived of sick leave, and deprived of more liberal vacations and insurance, in order to avoid claims of inequities by other non-exempt employees? If given both the perquisites of an exempt employee and the overtime of a non-exempt employee all other exempt employees could claim an inequity. In addition, this pyramids their regular rate and creates an inequity in overtime payments compared to other non-exempt employees.

If the Foremen Engineers are discharged for refusing to follow instructions to supervise the Power Plant then Respondent may face charges of violating Section 15 (a) (3) of the Act reading as follows:

> "(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

If the Foremen Engineers are not discharged because they neglect their responsibility of supervising, the Respondent *will have no supervision in the Power Plant.* The management of the company would be grossly negligent if it permitted the operation of its Power Plant without supervision.

In addition to consideration of the inequities between employees, we urge consideration of the inequity forced upon the Respondent if they are considered non-exempt. After relying upon their Supervisors in the Power Plant and rewarding them for acceptance of this responsibility, Respondent would be compelled to use those rewards as a

basis of paying them an additional amount for neglecting their responsibilities. This cannot be the intent of the Act.

The only proper conclusion is that these Foremen Engineers are exempt. In fact, the Foremen Engineers are and have been supervising in Respondent's Power Plant to the satisfaction of the management and the other employees therein—yes, and to themselves, except that "they would like to have their cake and eat it too," that is, be exempt and non-exempt.

The Respondent respectfully submits that the finding of the District Court that the three Foremen Engineers are exempt employees should be affirmed by this Court, and the Circuit Court's decision reversing the District Court's findings on the subject should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY OF RESPONDENT TO REPLY BRIEF FOR PETITIONER.

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I.

IMPORTANCE OF THE ISSUE.

The Administrator seeks to minimize the importance of the question presented in the case with respect to the exempt or non exempt character of Respondent's employment of the three (3) Foremen Engineers. He says in effect that the issue is of no general importance. It is before this Court for decision only because the Administrator believed the issue to be of sufficient importance to justify his suit for a permanent injunction. Certainly the Administrator would not seek to impose such a drastic remedy upon the Respondent because of a desire to promote litigation or to use the Act for punitive purposes. Thus because the Respondent, like the Administrator, believed the issue to be of paramount importance, the case has reached this Court although only three (3) out of more than Seventeen Hundred (1,700) of Respondent's employees are involved

and the possible financial liability of Respondent to those three (3) employees is relatively trifling compared to the cost of the defense of the case.

And entirely apart from the belief of the parties as to the importance of the exemption issue, it is of grave importance to employers in general to have an authoritative decision by this Court on the test for determining the exempt or non exempt character of executive employment. There have been scores of cases in the lower Courts involving this question. The Administrator, apparently, has followed the course of "when in doubt file suit." There is, of course, no record of the many instances where the employer acceded to the Administrator's demands before suit was filed.

It is true that, particularly in questions involving the executive exemption, there is little or no reason for employers to treat their employees as exempt executives in order to avoid the financial burden of overtime. Or as stated another way by the Presiding Officer at the Hearings Preliminary to Redefinition of the Administrator's Regulations:

> "• • • The penalty payment requirement for overtime work in the case of persons truly employed in an executive capacity would not usually have any considerable effect in spreading employment because in many instances the executive's work can not be shared. • • •" (Vol. 2 C. C. H. Labor Law Service 31,319.)

But even though a penalty payment for overtime to executive employees would not place a great financial burden upon employers, their exemption from the Act is of importance to industry for many other reasons.

The most important of these reasons is the absolute necessity for free and flexible employment contracts between employers and executives untrammeled by rigid requirements of the Act designed to protect hourly workers from substandard labor conditions. The Report Recommendations of the Presiding Officer state further reasons

why it is important that the restrictions of the Act should not apply.

> "* * * More important, as justification for unlimited hours of work, the opportunities for promotion to higher executive positions are clearly greater for those who already occupy some type of executive position. These intangible advantages are normally, though not always accompanied by more tangible advantages such as paid vacation and sick leave. Still more important is the fact that executives have a greater security of tenure than almost any other group of workers. When a factory retains only a skeleton crew, the foreman is normally a member of that crew; and the other members of the executive hierarchy also tend to retain their positions. Thus even the lower paid executives enjoy certain prerogatives that may be given weight. * * *" (Vol. 2 C. C. H. Labor Law Service 31,319.)

In addition to the general exemption question there is an issue of importance presented by the facts of this particular case.

II.

THE RIGHT OF THE RESPONDENT TO CLASSIFY EMPLOYEES AS EXEMPT EMPLOYEES UNDER THE ACT WITHOUT HAVING THE CLASSIFICATION THWARTED BY A REFUSAL OR NEGLECT BY THE EMPLOYEES TO PERFORM THE DUTIES ASSIGNED.

The facts found by the District Court after weighing all of the evidence demonstrated that the Foremen Engineers are clearly exempt under the Act and the Regulations of the Administrator if, *in fact, they perform the duties assigned to them.* The Fifth Circuit Court of Appeals in *Allen v. Atlantic Company,* 145 Fed. 2nd 761 (1944) so ruled in a case presenting nearly identical facts.

The Administrator says, however, that it is immaterial whether or not the Foremen Engineers would have been exempt had they performed the duties assigned to them since the determining factor is what, in fact, such employees testify they did or did not do that determines their exempt

status under the Administrator's Regulations. It is significant in this respect that the Administrator does not quote from his Regulations to support this stand. Respondent has been unable to find any language in the Regulations dealing with the subject. But even if the Administrator's Regulations would so provide, the Respondent would challenge them for this is not the intent of the Act.

It is stated in the Act that its purpose is to eliminate labor disputes and other burdens upon the free flow of goods in commerce. The burdens upon the free flow of commerce would be greatly increased by this obvious inducement to insubordination.

The issue is important to employers in general for if an employee may convert himself from an exempt employee to a non exempt employee by testifying that he refused or neglected to perform the duties assigned to him there may be an avalanche of law suits by employees throughout the country seeking to take advantage of the situation. If successful in this regard, such employees would be entitled to a double allowance of overtime. This overtime would be computed on a compensation basis which is certainly more liberal than would have been paid had those employees been considered non exempt. There is nothing in the legislative history of the Act indicating an intent by Congress to establish such an inequity.

III.

CONCLUSION.

The reply brief of the Administrator is largely devoted to a discussion of the testimony which, he asserts, demonstrates that the findings of the District Court were clearly erroneous. Respondent believes that the uncontradicted facts support the conclusions of the District Court. The only conflict in the evidence was with respect to whether or not the Foremen Engineers performed their assigned duties after they signed the Agreement of July, 1944. The District Court was able to weigh the evidence after personal

observation of the witnesses. Respondent respectfully asserts that the judgment of the District Court in this regard should be upheld.

In conclusion, we submit that the issues presented by the exemption question are of paramount importance and should be authoritatively decided by this Court.

All of which is respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 564.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *v.* The General Industries Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 31, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

In a complaint filed in the District Court, petitioner charged that respondent was violating the Fair Labor Standards Act [1] by failing to pay some of its employees time and one-half for statutory overtime, as required by § 7 (a) of the Act, and asked an injunction against continued violation. Respondent denied the charge, and separately alleged that any of its employees not compensated in accordance with the requirements of § 7 (a) were exempt from the Act by § 13 (a).

The Court, without a jury, heard witnesses for both parties with respect to the compensation and status of three engineers in respondent's power plant. It made special findings of fact, concluded that these men were exempt employees, and entered judgment for respondent.[2] The Circuit Court of Appeals thought the evidence did not sustain the District Court's findings relative to the engineers' exempt status. But it thought that the District Court had also found the engineers' compensation to be in accordance with the Act. It decided

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] *Walling* v. *General Industries Co.*, 60 F. Supp. 549.

that the evidence was adequate to this end, and affirmed the District Court's judgment.[3] We granted certiorari[4] to determine whether the ruling of the Circuit Court of Appeals was not inconsistent with this Court's decision on computation of overtime in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. On argument here, however, respondent continued to urge that the District Court was warranted in its findings as to the engineers' exempt status.[5] Having heard the argument and examined the record, we agree that it was. Therefore, we need not consider further the question of computation of overtime, and proceed only to state the considerations relevant to the particular ground of our decision.

There is no dispute as to the applicable law. Section 13 (a) exempts from the overtime provisions of the Act any person employed in an "executive capacity" as defined in regulations issued by the Administrator. The Regulations prescribe six conjunctive conditions to an executive capacity, which are set forth in the margin.[6] Respondent

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[3] *Walling* v. *General Industries Co.*, 155 F. 2d 711.

[4] —— U. S. ——.

[5] Respondent was entitled to make this contention here without filing a cross-petition for certiorari. *Langnes* v. *Green*, 282 U. S. 531, 538; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506, 509.

[6] 29 Code Fed. Regs. § 541.1, 5 F. R. 4077 (Regulations of the Administrator, Wage and Hour Division, U. S. Dep't of Labor, Oct. 24, 1940, amended Jan. 17, 1942) provides as follows:

"Section 541.1.—Executive.

"The term 'employee, employed in a bona fide executive . . . capacity' in section 13 (a) (1) of the act shall mean any employee—

"(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

"(B) who customarily and regularly directs the work of other employees therein, and

"(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to

had the burden of proving the existence of these conditions, if it would rely on its defense that the engineers were exempt employees.[7]

There was evidence to the following effect. Respondent operates at Elyria, Ohio, a plant engaged in the production of small motors and plastic products. Part of this plant consists of a power-house containing a boiler room and engine room. In the former are four boilers. These supply the steam required to drive three large electrical generators which are the source of power for the entire plant, and to create the high steam-pressures and air-pressures employed in molding plastics. In the engine room, besides the generators, are compressors, engines, and other equipment. All this machinery, in both rooms, constitutes an interrelated and interdependent system. It must be carefully and skillfully tended at all times in order to maintain the power and pressure required for continuous 24-hour operation of the plant, to avoid damage to the tremendous investment in the machinery itself, and to guard against the fearful consequences of an explosion.

During the period covered by the evidence, the power-house was manned by the following personnel. At the top

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the advancement and promotion or any other change of status of other employees will be given particular weight, and

"(D) who customarily and regularly exercises discretionary powers, and

"(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

"(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

[7] See *Helliwell* v. *Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Fletcher* v. *Grinnell Brothers*, 150 F. 2d 337, 340-341 (C. C. A. 6); *Smith* v. *Porter*, 143 F. 2d 292, 294 (C. C. A. 8).

was the chief engineer, who apparently adhered to no precise duty-hours, but was customarily present most of the morning and afternoon and subject to call, in the event of an emergency, twenty-four hours a day. Directly under and responsible to him were the three "operating engineers" whose status is in issue. They worked consecutive eight or eight and one-half hour shifts, one of them being present in the powerhouse at all times. Finally, there were an unspecified number of firemen and coal-passers, who, collectively, were also on twenty-four hour duty.

The engineers in question were paid regular monthly salaries of more than $200 per month, for which they regularly worked six-shift weeks. They received sick leave, vacations with pay, bonuses, insurance, and pension rights usually reserved for supervisory employees.

The engineers were in charge of the powerhouse and performed the duties generally incident to direct supervision of a highly mechanized operation. Respondent's vice president and factory manager testified that they acted as foremen of the firemen and coal-passers. This testimony was corroborated by other facts. In July, 1944, two months before the complaint in this case was filed, the engineers signed agreements with respondent stating their desire "to be regarded as foremen, as in the past, with foremen privileges and continue on a salary basis." Three weeks later the International Brotherhood of Firemen, Oilers and Helpers abandoned a long-contested claim of right to represent the engineers, thereby formally recognizing their supervisory status. Indeed, the nature of the operations in the powerhouse was such that the immediate and continuous supervision of trained persons was indispensable, and there were concededly no other employees to give such supervision. The engineers were required to maintain constant observation of all machinery in the powerhouse, and to make

regular inspections and necessary repairs. In addition they were required to spend a small part of their time in oiling and cleaning the engines.

The District Court, having made findings substantially as stated above, proceeded to make additional findings of the existence of each of the facts on which an executive status, as defined by the Regulations, is made to depend.

We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed.[8] The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility.[9]

Affirmed.

[8] Rule 52 (a), Federal Rules of Civil Procedure; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 12; *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30. See *District of Columbia* v. *Pace*, 320 U. S. 698, 701.

[9] Rule 52 (a), Federal Rules of Civil Procedure; *Adamson* v. *Gilliland*, 242 U. S. 350; *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 37, 38, 41.

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[March 31, 1947.]

Mr. Justice Rutledge, dissenting.

In my opinion the Circuit Court of Appeals correctly found that the evidence is not sufficient to sustain the findings upon which the District Court concluded that the operating engineers are exempt under § 13 (a) (1) of the Fair Labor Standards Act. It said, unanimously:

> "The District Court found as a fact that Stegman, Page and Spooner were employed as foremen or supervisors of the department, with power to supervise the work of firemen and coal-passers in the boiler-room; that they customarily and regularly directed the work of other employees in the department, and customarily exercised discretionary powers. We think these findings are not sustained by the evidence. The work done by the engineers was highly skilled mechanical work. While the machinery was vital to the plant, dangerous and complicated, its operation involved no exercise of discretion, but merely the proper application of the skilled engineering training which these men had received. Although the three engineers were responsible for the proper operation of the machinery during their shifts, and, as the factory manager testifies, 'in charge of management of the property,' none of them could

fire or hire or give orders to any man in the boiler-room. Latteman, the chief engineer, who was present at the plant during one shift and on call 24 hours a day and seven days a week, was in full charge of the department. While Latteman might act on information from Stegman, Page, or Spooner, during the period involved, orders emanated only from him. It is not shown that Stegman, Page, or Spooner ever made any recommendation concerning the change in status of the boiler-men. It was essential to have proper steam pressure in the boiler-room, but if the three engineers desired in this connection to secure action from the firemen and coal-passers, they had to secure an order from Latteman. This evidence is not contradicted." 155 F. 2d 711, 714.

An independent examination of the record confirms the Court of Appeals' conclusions. It discloses that on one or two occasions an operating engineer tried to give orders to firemen or coal passers in the boiler room, but in each instance those men refused to follow them and took their orders solely from Latteman. This falls far short at least of the regular and customary supervision required by §§ 541.1 (A) and (B) of the controlling regulations to make the exemption operative.

Since the Court does not reach other questions presented on the record, I express no opinion concerning them.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.